Supreme Court, U.S.
FILED

99 412 SEP 3 1999

OFFICE OF

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LOUISVILLE COUNTRY CLUB;
IDLE HOUR COUNTRY CLUB;
PENDENNIS CLUB, INC.,
Petitioners,

v.

BEVERLY L. WATTS, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

D. PATTON PELFREY
Counsel of Record
BROWN, TODD & HEYBURN PLLC
400 WEST MARKET STREET, SUITE 3200
LOUISVILLE, KY 40202
(502) 589-5400

OF COUNSEL:

ROBERT W. DIBERT
BROWN, TODD & HEYBURN PLLC
400 WEST MARKET ST.
SUITE 3200
LOUISVILLE, KY 40202
(502) 589-5400
Counsel for Pendennis Club, Inc.

RICHARD G. GRIFFITH
STITES & HARBISON
2300 LEXINGTON FINANCIAL CENTER
LEXINGTON, KY 40202
(606) 226-2300
Counsel for Idle Hour Country Club

JOHN O. SHELLER
SMITH AND SMITH
400 NORTH FIRST TRUST CENTRE
200 SOUTH FIFTH ST.
LOUISVILLE, KY 40202
(502) 587-0761
Counsel for Louisville Country Club

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

130 PP

QUESTION PRESENTED

This Section 1983 action involves continuing and repeated efforts by members of the Kentucky Commission on Human Rights ("KCHR") to obtain membership lists and other confidential information regarding the relationships between Petitioners (the "Clubs") and their individual members, purportedly to investigate whether the Clubs or their members have taken improper tax deductions under anti-discrimination provisions of the Kentucky Revenue Code. The district court granted summary judgment in the Clubs' favor, ruling that Respondents lacked authority under the Kentucky Civil Rights Act to investigate the Clubs after the KCHR previously had made an administrative finding that the Clubs are exempt from regulation as private clubs. The Court of Appeals for the Sixth Circuit reversed, ruling *sua sponte* that the district court should have abstained from exercising jurisdiction under *Younger v. Harris*, 401 U.S. 37 (1971).

This petition presents the following question:

Whether the Tax Injunction Act, 28 U.S.C. §1341, or the judicial doctrine of abstention, prevents *bona fide* private clubs from seeking relief in federal court to remedy a state administrative agency's invasion of their members' First and Fourteenth Amendment rights of privacy and free association, where the state agency acts outside its enabling legislation and state law provides no prospect of meaningful relief in state court?

PARTIES TO THE PROCEEDING

Petitioners

Louisville Country Club, Idle Hour Country Club, and Pendennis Club, Inc. Pursuant to Supreme Court Rules 14(b) and 29.6, Petitioners state that none of the Clubs has a parent or subsidiary corporation.

Respondents

Beverly L. Watts, in her official capacity as Executive Director of the Kentucky Commission on Human Rights; Howard O. Mann, in his official capacity as Chairperson of the Kentucky Commission on Human Rights; M. Gayle Hoffman, in her official capacity as Treasurer of the Kentucky Commission on Human Rights; Susan D. Phillips, Louise Cooper, Charles A. Alexander, Dorothy A. Malone, Terry Flesher, Joseph McMillan, Henry Jackson, Thurmond Coleman, Sr., and Jennifer Jolly Ryan, in their official capacities as members of the Kentucky Commission on Human Rights.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES viii

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

Statement Of Facts 3
The Proceedings Below 5

REASONS FOR GRANTING THE WRIT 8

I. Petitioners Are *Bona Fide* Private Clubs Whose Members Enjoy Rights Of Privacy And Free Association Under The First And Fourteenth Amendments To The United States Constitution 8

II. The Court Of Appeals Improperly Applied *Younger* Abstention To Preclude The Clubs From Vindicating Rights Of Free Association Guaranteed By The First and Fourteenth Amendments To The United States Constitution 11

A. There Is No "Ongoing State Judicial Proceeding" 12

B. There Are No "Important State Interests" Underlying The Administrative Proceeding At Issue In This Case 13

C. The Clubs Do Not Have A Fair Opportunity To Raise Constitutional Issues In The Purported State Judicial Proceedings 16

III. The District Court Properly Declined To Abstain From Hearing The Clubs' Claims Under The *Pullman* Doctrine 17

IV. The District Court Erred In Ruling That The Tax Injunction Act, 28 U.S.C. §1341, Precluded The Clubs' Constitutional Challenge To Respondents' Attempt To Violate The First And Fourteenth Amendment Rights Of Club Members Through A Purported Investigation Under The Kentucky Revenue Code 19

A. The Tax Injunction Act Is Inapplicable Because The Claims In This Case Do Not Interfere With The Proper Assessment, Levy Or Collection Of Taxes 20

B. Respondents' Administrative Complaints And Discovery Demands Violate The Rights Of Free Association That Club Members Enjoy Under The First And Fourteenth Amendments 22

CONCLUSION 26

APPENDIX A
Sixth Circuit Opinion, 4/16/99 ..... 1a

APPENDIX B
U. S. District Court Judgment, 5/13/97 ..... 7a

APPENDIX C
U. S. District Court Memorandum Opinion and Order on Motion for Summary Judgment, 5/13/97 ..... 9a

APPENDIX D
U. S. District Court Memorandum Opinion and Order on Motion to Dismiss, 2/6/96 ..... 17a

APPENDIX E
Kentucky Commission on Human Rights Conclusions of Law and Order, 3/15/95 ..... 28a

APPENDIX F
Sixth Circuit Order Denying Rehearing, 6/7/99 ..... 38a

APPENDIX G
Amendment I – Constitution of the United States 40a

APPENDIX H
Amendment XIV – Constitution of the United States ... 41a

APPENDIX I
28 U.S.C. § 1341 ..... 43a

APPENDIX J
42 U.S.C. § 1983 ..... 44a

APPENDIX K
42 U.S.C. § 1988 ..... 45a

APPENDIX L
Kentucky Revised Statutes § 131.030(1) 47a

APPENDIX M
Kentucky Revised Statutes § 131.081(10) 49a

APPENDIX N
Kentucky Revised Statutes § 131.130(1) 54a

APPENDIX O
Kentucky Revised Statutes § 131.190 ..... 57a

APPENDIX P
Kentucky Revised Statutes § 135.030(3) 60a

APPENDIX Q
Kentucky Revised Statutes § 135.050(2) 62a

APPENDIX R
Kentucky Revised Statutes
§ 141.010(11)(d) and 13(f) 64a

APPENDIX S
Kentucky Revised Statutes § 344.120 . . . . . 76a

APPENDIX T
Kentucky Revised Statutes § 344.130 . . . . . 77a

APPENDIX U
Kentucky Revised Statutes § 344.200(2) 78a

APPENDIX V
Kentucky Revised Statutes § 344.240(1) 82a

APPENDIX W
Kentucky Revised Statutes § 344.270 . . . . . 85a

APPENDIX X
Kentucky Commission on Human Rights
Discovery Request, 10/15/93 . . . . . 86a

APPENDIX Y
Kentucky Commission on Human Rights
First Request for Production of Documents,
3/31/95 . . . . . 89a

TABLE OF AUTHORITIES

Cases

American Motor Sales Corp. v. Runke, 708 F.2d 202, 207-09 (6th Cir. 1983) 16

Arizonans for Official English v. Arizona, 520 U.S. 43, 137 L.Ed.2d 170, 199 (1997) 19

Barringer v. Griffes, 964 F.2d 1278 (2d Cir. 1992) 22

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 n.4 (1987) 8, 9, 23

Commonwealth v. Gossum, 887 S.W.2d 329, 333 (Ky. 1994) 22

Department for Natural Resources v. Stearns Coal & Lumber Co., 563 S.W.2d 471, 473 (Ky. 1978) ... 18

Direct Marketing Assoc. v. Bennett, 916 F.2d 1451 (9th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991) 22

Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965) 15

Franchise Tax Board of California v. Alcan Aluminum Ltd., 493 U.S. 331, 338 (1990) 20

Hinrichs v. Whitburn, 975 F.2d 1329 (7th Cir. 1992) 3,13,16

Hobson v. Wilson, 737 F.2d 1, 29 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1995) 10

Johnson v. Correll, 332 S.W.2d 843, 845 (Ky. 1960) 18

Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852, 855-56 (Ky. 1981) 22

Louisiana Debating & Literary Assoc. v. City of New Orleans, 42 F.3d 1483 (5th Cir.), *cert. denied*, 515 U.S. 1145 (1995) 3, 7, 13, 15, 24

Meredith v. Winter Haven, 320 U.S. 228, 234 (1943) 19

Middlesex County Ethics Commission v. Garden State Bar Assoc., 457 U.S. 423, 432 (1982) 11

NAACP v. Alabama, 357 U.S. 449, 462, 466 (1958) ... 8, 23

New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350, 370 (1989) 12, 14

New York State Club Assoc. v. City of New York, 487 U.S. 1, 8-9 (1988) 8

Northwest Airlines, Inc. v. Tennessee State Board of Equalization, 11 F.3d 70 (6th Cir. 1993) 22

Parker v. Commonwealth of Kentucky, 818 F.2d 504, 508-09 (6th Cir. 1987) 17

Pendleton v. Heard, 824 F.2d 448, 451 (5th Cir. 1987) 21

Planned Parenthood of Greater Iowa, Inc. v. Atchison, 126 F.3d 1042 (8th Cir. 1997) 3, 13

Prentis v. Atlantic Coastline Co., 211 U.S. 210, 226 (1908) 12

Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) 6, 17

Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984) 9, 23

Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 522 (1981) 20

Schneider v. Indian River Community College Foundation, 875 F.2d 1537, 1543 n. 6 (11th Cir. 1989) 10

Swisher v. Brady, 438 U.S. 204, 213 n.11 (1978) 7

Telco Communications, Inc. v. Carbaugh, 885 F.2d 1225 (4th Cir. 1989), *cert. denied*, 495 U.S. 904 (1990) 2, 13

Township of Hillsborough v. Cromwell, 326 U.S. 620, 628 n.10 (1946) 21

Tyler v. Collins, 709 F.2d 1106, 1108 (6th Cir. 1983) 17

United States v. Hohri, 482 U.S. 64, 74 n.6 (1987) 19

United States v. P.H.E., Inc., 965 F.2d 848, 856 (10th Cir. 1992) 16

Wooley v. Maynard, 430 U.S. 705, 710 (1977) 17

Younger v. Harris, 401 U.S. 37 (1971) 2, 7, 11, 12, 17

Statutes

U.S. Const., Amendment I 2, 22, 25

U.S. Const., Amendment XIV 2, 22, 25

28 U.S.C. §1254(1) 1

28 U.S.C. §1341 ..... 2, 5, 20

42 U.S.C. §1983 ..... 2, 3

42 U.S.C. §1988 ..... 2, 3

Kentucky Revised Statutes §131.030(1) 15, 18, 21

Kentucky Revised Statutes §131.081(10) 18

Kentucky Revised Statutes §131.130(1) 12, 15, 18, 21

Kentucky Revised Statutes §131.190 18

Kentucky Revised Statutes §135.030(3) 18

Kentucky Revised Statutes §135.050(2) 18

Kentucky Revised Statutes §141.010 . . . . . 4, 6
Kentucky Revised Statutes §141.010(11)(d) 3, 18
Kentucky Revised Statutes §141.010(13)(f) 3
Kentucky Revised Statutes §344.120 . . . . . 3, 18, 24
Kentucky Revised Statutes §344.130 . . . . . 4, 6, 14, 25
Kentucky Revised Statutes §344.200(2) 12, 14
Kentucky Revised Statutes §344.240(1) 16
Kentucky Revised Statutes §344.270 16

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is not reported and is reprinted in the Appendix ("App.") at App. A at 1-6a.[1] The order of the Court of Appeals denying Petitioners' ("the Clubs'") petition for rehearing and suggestion for rehearing *en banc*, is not reported and is reprinted at App. F at 38-39a. The order of the United States District Court for the Eastern District of Kentucky granting the Clubs' motion for summary judgment is not reported and is reprinted at App. C at 9-16a. The order of the United States District Court for the Eastern District of Kentucky granting in part and denying in part the KCHR's motion to dismiss is not reported and is reprinted at App. D at 17-27a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered judgment on April 16, 1999. It denied a timely petition for rehearing and suggestion for rehearing *en banc* on June 7, 1999. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

---

[1]Citations to "App." are to the Appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments to the United States Constitution, and are reprinted at App. G at 40a and H at 41-42a. The statutory provisions involved are 28 U.S.C. §1341 and 42 U.S.C. §1983 and 42 U.S.C. §1988, and are reprinted at App. I at 43a, J at 44a and K at 45-46a.

STATEMENT OF THE CASE

The Court of Appeals held, as a matter of law, that *bona fide* private clubs may not seek a federal forum to redress a state agency's invasions of their First Amendment rights of privacy and free association where the state agency acts wholly outside its enabling legislation, and the clubs have no prospect of meaningful judicial relief in state court. The Court of Appeals reversed the District Court's award of summary judgment to the Clubs, and held instead that the District Court was required to abstain from hearing the entire controversy by reason of this Court's decision in *Younger v. Harris*, 401 U.S. 37 (1971). In so doing, the Court of Appeals has improperly immunized state administrative agencies from judicial review of administrative procedures and eviscerated the First Amendment rights of private clubs. The Court of Appeals' decision further conflicts with decisions of the Courts of

Appeals for the Fourth[2], Fifth[3], Seventh[4], and Eighth[5] Circuits.

Statement Of Facts

This is an action for declaratory, injunctive and monetary[6] relief arising under 42 U.S.C. §§1983 and 1988. The Court of Appeals' Opinion fairly describes the facts underlying this Petition, as follows:

> In 1991, the Reverend Louis Coleman filed a complaint with the Kentucky Commission on Human Rights ("KCHR") alleging that plaintiffs in this case, the Louisville Country Club, the Idle Hour Country Club, and the Pendennis Club, Incorporated, denied him membership because of his race. The complaint alleged violations of Ky. Rev. Stat. Ann. §344.120 (Banks-Baldwin 1999) and §141.010(11)(d) & (13)(f). Section 344.120 prohibits racial discrimination by certain types

---

[2] *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989), *cert. denied*, 495 U.S. 904 (1990).

[3] *Louisiana Debating & Literary Assoc. v. City of New Orleans*, 42 F.3d 1483 (5th Cir.), *cert. denied*, 515 U.S. 1145 (1995).

[4] *Hinrichs v. Whitburn*, 975 F.2d 1329 (7th Cir. 1992).

[5] *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042 (8th Cir. 1997).

[6] The Clubs seek to recover their attorneys' fees pursuant to 42 U.S.C. §1988. Because the KCHR has not yet actually obtained membership lists or other confidential materials regarding Club members, the Clubs have not yet asserted claims for compensatory or punitive damages against the KCHR or any of its officers in their individual capacities.

> of organizations, while §141.010 forbids tax deductions for organizations that discriminate. The KCHR later determined that it lacked jurisdiction over plaintiffs because they were private social clubs as defined by §344.130.
>
> At the request of a State General Assembly Representative, the Kentucky Attorney General reviewed the KCHR's interpretation of its jurisdiction. The Attorney General disagreed with the KCHR's interpretation, concluding that the KCHR's authority to investigate whether an organization had racially discriminated for purposes of the tax statutes is not limited by §344.130. Subsequent to the Attorney General's opinion, then-Commissioner Mae Cleveland filed identical, "commissioner-complaints" against plaintiffs, and the KCHR began an investigation of the matter.

Opinion, App. A at 2a.

KCHR's administrative complaints and related discovery requests (App. X at 86-88a and Y at 89-91a) constitute an intentionally broad and wide-ranging intrusion into the details of the relationships between the Clubs and their members.[7] For purposes of this appeal, the KCHR has conceded that it seeks "discovery about the extent club facilities are used by members as instruments of commerce for business

---

[7] *See, e.g.*, October 15, 1993 Weatherby letter to Louisville Country Club (App. X at 86-88a); March 31, 1995, "First Request for Production of Documents" in *KCHR v. Louisville Country Club*, Nos. 256-PA, 257-PA, 258-PA (App. Y at 89-91a).

lunch or dinner meetings, or to entertain customers or clients."[8] The KCHR also has conceded that the Clubs are *bona fide* private clubs which are exempt from investigation under the Kentucky Civil Rights Act. *See* "Conclusions of Law and Order" in *Cleveland v. Louisville Country Club, et al.*, Complaint Nos. 256-PA, 257-PA, 258-PA (KCHR 3/15/95) ("[T]his Commission clearly has not been granted the statutory authority to enforce the Kentucky Civil Rights Laws against the Respondents") (App. E at 31a).

The Proceedings Below

In May 1995, the Clubs filed separate actions against the KCHR and its Commissioners in their official capacities, for declaratory and injunctive relief to prevent violations of Club members' rights of free association protected under the First and Fourteenth Amendments to the United States Constitution (RA 29-217, RA 218-352, RA 353-499).[9] The actions were consolidated on June 20, 1995 (RA 8, entry 7, RA 22, entry 20, RA 28, entry 20); since that time the KCHR itself has been dismissed as a party-Defendant by reason of the Commonwealth of Kentucky's immunity from suit under the Eleventh Amendment (App. D at 18-19a, 26a). During the pendency of the action, certain named Commissioner-Defendants have been dismissed or added as they left or joined the KCHR. (RA 670-673, RA 764-767.)

In August 1995, Respondents moved to dismiss the action on grounds that the Tax Injunction Act, 28 U.S.C.

---

[8]"Brief of Appellants," at 6 n.2, filed with the U.S. Court of Appeals for the Sixth Circuit on March 24, 1998.

[9]Citations to "RA" are to pages of the "record on appeal" (Joint Appendix) filed with the U.S. Court of Appeals for the Sixth Circuit on March 4, 1998.

§1341, precluded the District Court from reviewing the Respondents' actions purportedly permitted under the Kentucky Revenue Code (RA 500-517). Alternatively, Respondents urged the District Court to abstain from hearing this action by reason of the doctrine of abstention first articulated in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) (RA at 509-10). Finally, Respondents argued in the alternative that the District Court should certify questions of law to the Kentucky Supreme Court. (RA at 510).

As the Court of Appeals' Opinion noted, in February 1996, the District Court

> dismissed plaintiffs' claims to the extent that they required a ruling on the constitutionality of portions of the Kentucky Revenue Code. However, the court ruled that the Tax Injunction Act does not bar the court's consideration of the limitation imposed by §344.130 on KCHR's jurisdiction, that it should not decline jurisdiction based upon the abstention doctrine set forth in *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), and that it should not certify the statutory interpretation question to the Supreme Court of Kentucky.
>
> The parties then briefed the remaining claims, and the district court entered summary judgment for plaintiffs, ruling that §141.010 is not a grant of jurisdiction to the KCHR, and thus that the KCHR's jurisdiction in §141.010 determinations is limited to its authority under §344.130.

Opinion, App. A at 3a.

Respondents filed their timely Notice of Appeal on June 12, 1997 (RA 777-78); the Clubs filed their timely cross-appeal on June 25, 1997 (RA 779-81). As the Court of Appeals observed:

> Defendants appeal the district court's ruling concerning the Tax Injunction Act, abstention, and certification and the court's grant of summary judgment for plaintiffs. Plaintiffs cross-appeal the district court's dismissal of their claims concerning the constitutionality of the Kentucky tax statutes.

Opinion, App. A at 3a.

Without addressing any of the issues raised by the parties and resolved by the district court, the Court of Appeals ruled *sua sponte* that the district court should have abstained from adjudicating the Clubs' claims by reason of the *Younger* abstention doctrine. Although the Court of Appeals' *sua sponte* action is not wholly unprecedented, this Court has disapproved the practice. *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978). This is particularly true where, as here, there is minimal or no interference with the purported state proceeding because it has been deferred by acquiescence of the state pending adjudication of the federal claims.[10] *Louisiana Debating*, 42 F.3d at 1490-91. Indeed, the Fifth Circuit's decision in *Louisiana Debating* is virtually identical on its facts to this action, so that the Sixth Circuit's Opinion in this case creates a clear conflict among the Courts of Appeals.

---

[10]"Brief of Appellants," at 7, filed with the U.S. Court of Appeals for the Sixth Circuit on March 24, 1998.

REASONS FOR GRANTING THE WRIT

I. Petitioners Are *Bona Fide* Private Clubs Whose Members Enjoy Rights Of Privacy And Free Association Under The First And Fourteenth Amendments To The United States Constitution[11]

It is well-settled that *bona fide* private clubs need not provide the details of their membership relations, including membership lists, for general government scrutiny and intrusion into their private affairs. *See NAACP v. Alabama*, 357 U.S. 449, 462, 466 (1958):

> This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.
>
> ...
>
> Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association. ... We think that the production order, in the respects here drawn in question, must be regarded as entailing the likelihood of a substantial restraint upon the exercise by members of their right to freedom of association.
>
> ...
>
> We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so

---

[11] Decisions of this Court clearly establish that the Clubs have standing to assert constitutional rights of privacy and free association on behalf of their members. *New York State Club Assoc. v. City of New York*, 487 U.S. 1, 8-9 (1988); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 n.4 (1987).

> related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment.

More recently, this Court reaffirmed that "freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987). Indeed,

> because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.

Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984).

Moreover,

> certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.

Id. at 618-19.

As this Court recognized, "individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state

interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.* at 619.

Thus, "associational activity need not relate to a matter of public concern for First Amendment protection to apply." *Schneider v. Indian River Community College Foundation*, 875 F.2d 1537, 1543 n. 6 (11th Cir. 1989). In particular, "Government action, taken with the intent to disrupt or destroy lawful organizations, or to deter membership in those groups, is absolutely unconstitutional." *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1995). Despite these admonitions and legacy of judicial respect for the rights of individuals to gather privately in small groups of their own choosing, the Record in this case shows that the KCHR has initiated proceedings against the Clubs to harass their members and disrupt their affairs. In choosing to conduct an administrative inquiry into private Club affairs, the KCHR acted contrary to the advice of its own counsel and its own established precedent. The KCHR also has conceded that it has no authority to investigate the Clubs under the Kentucky Civil Rights Act.

Instead, the KCHR, at the urging of the state Attorney General,[12] has chosen to use an investigation of the Clubs as a legislative device to expand its jurisdiction through the Kentucky Revenue Code, and to wage an administrative vendetta against its stereotypical profile of Club members and Club activities.[13] The end result of this latter-day witch-hunt

---

[12]The Attorney General, not coincidentally, represented Respondents in the underlying action and on appeal.

[13]Respondents perjoratively refer to the Clubs' members as "white male golfers." "Brief of Appellants," at 38, filed with the U.S. Court of Appeals for the Sixth Circuit on March 24, 1998.

can only be the harassment of Club members, disruption of Club activities and ultimately deterrence of Club membership. The KCHR's pretext of investigating Club members for improper tax deductions is wholly specious, because KCHR has no authority to assess or collect taxes and because club dues are not deductible on either federal or state tax returns.

Consequently, the ultimate question for this Court is whether the state may use administrative investigations to harass what the state has conceded are *bona fide* private organizations. The Clubs respectfully submit that, contrary to the Court of Appeals' opinion, the federal courts need not abstain from resolving this constitutional issue in their favor.

II. The Court Of Appeals Improperly Applied *Younger* Abstention To Preclude The Clubs From Vindicating Rights Of Free Association Guaranteed By The First and Fourteenth Amendments To The United States Constitution

In *Middlesex County Ethics Commission v. Garden State Bar Assoc.*, 457 U.S. 423, 432 (1982), this Court articulated three criteria for determining whether *Younger* abstention may be proper in noncriminal proceedings: (1) whether there are ongoing state judicial proceedings; (2) whether the proceedings implicate important state interests; and (3) whether there is an adequate opportunity in the state proceedings to raise constitutional challenges. A review of the undisputed facts and controlling law in this case shows that, contrary to the Court of Appeals' findings, none of the *Middlesex County* criteria is met in this case.

A. There Is No "Ongoing State Judicial Proceeding"

The Record shows that prior to filing the administrative complaints in this action, the KCHR found that it lacked jurisdiction to proceed against the Clubs. App. E at 31a. That administrative finding has never been overruled. Instead, the KCHR complaints underlying this action were filed ostensibly for tax collection purposes at the instance of an opinion from the Commonwealth's Attorney General.

Consequently, there is no administrative action by the KCHR under its enabling legislation, KRS 344.200(2), App. U at 78-79a. Moreover, any findings resulting from the KCHR complaints cannot result in action against the Clubs or Club members under the Kentucky Revenue Code because such actions are exclusively within the jurisdiction of the Kentucky Revenue Cabinet. KRS 131.130(1), App. N at 54a.

In these circumstances, the Court of Appeals erred when it held that the KCHR complaints constituted a "state judicial proceeding" for purposes of *Younger* abstention. Contrary to the Court of Appeals' Opinion, the administrative complaints in this case are not of the character which "investigates, declares and enforces liabilities as they stand on present and past facts and under laws supposed already to exist." Opinion, App. A at 5a, *quoting New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 370 (1989); *Prentis v. Atlantic Coastline Co.*, 211 U.S. 210, 226 (1908). Instead, at most, the KCHR's pre-ordained conclusions may be intrusive advisory opinions which the Kentucky Revenue Cabinet may or may not choose to consider in deciding whether to investigate individual Club members.

Thus, the Court of Appeals' Opinion asserts, as a matter

of fact, that the KCHR findings against the Clubs will lead to prosecution without citing a single supporting reference in the Record. Opinion, App. A at 6a. The Clubs respectfully suggest that such a finding is wholly speculative. *See Hinrichs v. Whitburn*, 975 F.2d 1329, 1333 (7th Cir. 1992): "There can be no interference with a *state prosecution* in this case, because no prosecution has ever been initiated against plaintiff" (emphasis in original).

If anything, the KCHR complaints underlying this case are "legislative," not "judicial," because the Respondents are seeking to enlarge KCHR's jurisdiction beyond the scope of its enabling statute. As the conflicting decisions from the Courts of Appeals for the Fourth, Fifth and Eighth Circuits make clear, such preliminary proceedings simply are not "judicial" for purposes of *Younger* abstention. *See Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1228-29 (4th Cir. 1989), *cert. denied*, 495 U.S. 904 (1990); *Louisiana Debating & Literary Assoc. v. City of New Orleans*, 42 F.3d 1483, 1490-91 (5th Cir.), *cert. denied*, 515 U.S. 1145 (1995); *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042, 1048 (8th Cir. 1997) (no "judicial proceeding" where the agency had "conducted no investigation, held no hearings, received no evidence, kept no record, and enforced no liabilities").

B. There Are No "Important State Interests" Underlying The Administrative Proceeding At Issue In This Case

Put simply, there are no "important state interests" to support the administrative complaints underlying this case. At most, the KCHR's administrative action will produce only an advisory opinion about whether the Kentucky Revenue Cabinet **might** investigate and disallow tax deductions which individual Club members **might** have taken improperly. KCHR's

speculation falls far short of this Court's requirement in *New Orleans Public Service, supra*, that the state's interest in the proper enforcement of its laws must outweigh the protection of constitutional rights:

> [C]onstitutional challenges to state action ... call into question the legitimacy of the State's interest in its proceedings reviewing or enforcing that action ... when we inquire into the substantiality of the State's interest in its proceedings we do not look narrowly to its interest in the outcome of the particular case -- which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceeding to the State. In *Younger*, for example, we did not consult California's interest in prohibiting John Harris from distributing handbills, but rather its interest in "carrying out the important and necessary task" of enforcing its criminal laws.

491 U.S. at 365.

As noted previously, the Court of Appeals concluded without any factual support or legal analysis that the KCHR complaints would "result in full prosecution of plaintiffs under existing Kentucky civil rights law" (Opinion, App. A at 5a). To the contrary, however, the KCHR cannot "prosecute" the Clubs or anyone else absent a finding of probable cause which has never been made. *See* KRS 344.200(2), App. U at 78-79a. Moreover, the Clubs are not subject to KCHR "prosecution" under Kentucky civil rights laws because they are exempt from the statute. KRS 344.130, App. T at 77a.

Finally, KCHR's purported investigation under the Kentucky Revenue Code cannot result in "prosecution" of the Clubs because only the Revenue Cabinet has jurisdiction to investigate and "prosecute" tax law violations. *See* KRS 131.130(1), App. N at 54a (Revenue Cabinet to "make administrative regulations, and direct proceedings and actions, for the administration **and enforcement** of **all** tax laws of this state") (emphasis added); KRS 131.030(1): "The Revenue Cabinet shall exercise **all** administrative functions of the state in relation to the state revenue and tax laws ... the supervision of tax collections, **and** the **enforcement** of revenue and tax laws" (App. L at 47a) (emphasis added).

The fact that Respondents lack authority under Kentucky civil rights laws to investigate the Clubs is equally fatal to the Court of Appeals' other purported "important state interest," prohibiting unlawful discrimination. As noted above, the Clubs are exempt from the Kentucky Civil Rights Act and the KCHR previously acknowledged that it has no jurisdiction to investigate these Clubs for civil rights violations. Consequently, there is no "important state interest" to offset the unlawful chilling effect of improper administrative invasion of First Amendment rights. *See Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965) ("the chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure"); *Louisiana Debating*, *supra* at 1492 n.12 (5th Cir.), *cert. denied*, 515 U.S. 1145 (1995):

> [T]he Commission's investigative powers and procedures strike at the heart and soul of the Clubs' and their members' associational rights. If the district court were to stay its hand while the [government] violates that which the Constitution protects, then the Clubs' and their

members' First Amendment freedoms would be for naught.

See also, United States v. P.H.E., Inc., 965 F.2d 848, 856 (10th Cir. 1992) ("the state may not use the agents and instrumentalities of law enforcement to curb speech protected by the First Amendment"); *Hinrichs, supra*; *American Motor Sales Corp. v. Runke*, 708 F.2d 202, 207-09 (6th Cir. 1983) (refusing to abstain where delays due to administrative or judicial process could chill First Amendment rights).

In sum, the only "important state interest" in this case is protecting the First Amendment rights of Club members against an improper investigation and speculative advisory opinion based upon the KCHR complaints. Neither of the purported interests proffered in the Court of Appeals' Opinion justifies abstention in conflict with the *Hinrichs* and *P.H.E.* decisions of the Seventh and Tenth Circuits, so the Clubs respectfully suggest that the judgment of the Sixth Circuit should be reversed.

C. The Clubs Do Not Have A Fair Opportunity To Raise Constitutional Issues In The Purported State Judicial Proceedings

The pending "proceeding" seeks discovery of the relationships between the Clubs and their members, ostensibly to provide evidence for subsequent formal proceedings under the Kentucky Revenue Code. As such, the Clubs have no redress for unlawful interlocutory discovery of their internal affairs because Kentucky law provides for judicial review only of final KCHR action. KRS 344.240(1) (App. V at 82a); KRS 344 -270 (App. W at 85a). Here, the only "final action" that might trigger judicial review would consist of the Clubs' contempt of a KCHR discovery order -- and this Court already

has made clear that a party need not subject itself to prosecution in order to vindicate its constitutional rights in federal court. *Wooley v. Maynard*, 430 U.S. 705, 710 (1977); *see also*, *Parker v. Commonwealth of Kentucky*, 818 F.2d 504, 508-09 (6th Cir. 1987) (*Younger* abstention inappropriate where Kentucky did not assure "a definite opportunity for the federal plaintiff to raise his constitutional claims on direct state judicial review of the state administrative proceedings").

III. The District Court Properly Declined To Abstain From Hearing The Clubs' Claims Under The *Pullman* Doctrine

Beyond the Court of Appeals' inappropriate *sua sponte* application of *Younger* abstention, it is clear that the district court properly declined to abstain pursuant to *Railroad Commission of Texas v. Pullman Co*, 312 U.S. 497 (1941). More specifically, *Pullman* abstention may be appropriate only where "constitutional adjudication plainly can be avoided if a definitive ruling on the state issue **would** terminate the controversy." 312 U.S. at 498 (emphasis added).

Thus, for purposes of this action, *Pullman* abstention would require "an unclear state law ... and the likelihood that a decision on the state constitutional issue would obviate our deciding the federal question." *Tyler v. Collins*, 709 F.2d 1106, 1108 (6th Cir. 1983).

In this case, the relevant state statute is clear -- the Kentucky Revenue Code disallows tax deductions for individuals or organizations that have been found to discriminate on the basis of race or other protected

classifications,[14] but it does **not** state that the KCHR is authorized to investigate any particular organization or individual beyond the scope of KCHR's enabling legislation in the Kentucky Civil Rights Act.[15] Instead, the Revenue Code makes clear that the Kentucky Revenue Cabinet is the only agency empowered to investigate and prosecute possible violations of the tax code. *See* KRS 131.030(1), -130(1), App. L at 47a, and N at 54a[16].

Kentucky case law is equally plain that the KCHR's regulatory jurisdiction cannot be expanded by implication. *See, e.g., Department for Natural Resources v. Stearns Coal & Lumber Co.*, 563 S.W.2d 471, 473 (Ky. 1978) ("administrative agencies are creatures of statute and must find within the statute warrant for the exercise of any authority which they claim"); *Johnson v. Correll*, 332 S.W.2d 843, 845 (Ky. 1960) ("powers not conferred are just as plainly prohibited as those which are expressly forbidden").

Nor does this case satisfy the second criterion for *Pullman* abstention because the only definitive ruling on the state issue that would "terminate the controversy" would be a ruling in favor of the Clubs. Any other ruling that either expanded

---

[14]KRS 141.010(11)(d), App. S at 76a.

[15]KRS 344.120, App. T at 77a.

[16]Other statutory provisions make clear that the Revenue Cabinet's powers are exclusive with respect to enforcement of the Kentucky Revenue Code. For example, the Revenue Cabinet has the power to settle disputes, KRS 135.030(3) (App. P at 61a), and initiate proceedings to determine amounts payable as taxes, KRS 135.050(2) (App. Q at 62a). Other statutes provide for confidentiality of tax administration proceedings, KRS 131.190 (App. O at 57-59a) and prohibit making tax investigations for non-tax purposes. KRS 131.081(10), App. M at 53a.

KCHR's jurisdiction to embrace tax matters, or permitted the KCHR to investigate the details of the Clubs' relationships with their members in the course of providing an advisory opinion to the Revenue Cabinet, would produce the same constitutional challenges as the Clubs have made in this case. The only differences would be the passage of time and endurance of more rounds of legal proceedings and related expense. Thus, "*Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state-court system before any resumption of proceedings in federal court." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 137 L.Ed.2d 170, 199 (1997).

IV. The District Court Erred In Ruling That The Tax Injunction Act, 28 U.S.C. §1341, Precluded The Clubs' Constitutional Challenge To Respondents' Attempt To Violate The First And Fourteenth Amendment Rights Of Club Members Through A Purported Investigation Under The Kentucky Revenue Code

The district court properly exercised its obligation to interpret Kentucky law and determine that Respondents lacked statutory authority to launch KCHR's current administrative complaints against the Clubs. *See Meredith v. Winter Haven*, 320 U.S. 228, 234 (1943) ("it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment"). In so doing, "a district judge's determination of a state-law question usually is reviewed with great deference." *United States v. Hohri*, 482 U.S. 64, 74 n.6 (1987). However, if this Court should choose to disturb District Judge Hood's authoritative interpretation of Kentucky law, then the Clubs respectfully suggest that the district court erred when

it ruled, as a matter of federal law, that the Tax Injunction Act, 28 U.S.C. §1341, precluded the Clubs from challenging the constitutionality of a KCHR investigation under the Kentucky Revenue Code.

A. The Tax Injunction Act Is Inapplicable Because The Claims In This Case Do Not Interfere With The Proper Assessment, Levy Or Collection Of Taxes

By its terms, the Tax Injunction Act ("TIA"), 28 U.S.C. §1341, provides that

> district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

As this Court has observed:

> The statute "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." ... This last consideration was the principal motivating force behind the Act[.]

Franchise Tax Board of California v. Alcan Aluminum Ltd., 493 U.S. 331, 338 (1990); *quoting Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981) (citation omitted).

However, "a remedy that is uncertain or speculative is not adequate to bar federal jurisdiction." *Id.* at 340. Moreover, the mere prospect of discretionary review in state court is not

a "plain, speedy and efficient remedy" for purposes of the TIA. *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 628 n.10 (1946). In those circumstances, "where the federal court has jurisdiction, it may pass on the whole case and agreeably with the desired practice decide it on local law questions, without reaching the constitutional issues." *Id.* at 629.

It is immediately obvious that the TIA cannot preclude the Clubs' constitutional challenges in this case because the Kentucky Revenue Code does not vest the Respondents with **any** power regarding "assessment, levy or collection" of taxes in the Commonwealth. As noted previously, that power is reserved exclusively to the Kentucky Revenue Cabinet. KRS 131.030(1), -130(1), App. L at 47a, and N at 54a. In addition, the Clubs' lawsuit is not directed at the assessment, levy or collection of taxes. Instead, the Clubs simply seek to prevent the KCHR from investigating the private relationships between the Clubs and their members in violation of the First Amendment.

The TIA therefore is plainly inapplicable. *See Pendleton v. Heard*, 824 F.2d 448, 451 (5th Cir. 1987) ("a court must look to the 'primary purpose' of the lawsuit to decide whether the statute prohibiting courts from restraining the collection of taxes would apply") (holding TIA inapplicable to a lawsuit challenging eligibility to vote on a state revenue bond issue).

Moreover, even if Respondents' advisory investigation were deemed somehow to involve the collection of Kentucky taxes, it is clear that the TIA is inapplicable because the Clubs do not have a "plain, speedy and efficient remedy" to redress KCHR's unconstitutional invasion of Club members' rights of privacy and free association. Initially, the Kentucky Supreme Court already has held that the Commonwealth's pre-deprivation remedies for improper taxes or tax procedures do

not provide due process as a matter of federal constitutional law. *Commonwealth v. Gossum*, 887 S.W.2d 329, 333 (Ky. 1994). While the constitutional deficiency may be remedied after the fact in the form of tax refunds in appropriate cases, such relief is wholly inadequate here -- where the constitutional violation lies in the improper invasion and prospective chilling of First Amendment rights in the course of an administrative investigation.

Similarly, the Kentucky Civil Rights Act does not afford a "plain, speedy and efficient remedy" to the KCHR's unconstitutional investigative acts. Kentucky courts must await a final action from the KCHR, and defer to the findings on the administrative record. *E.g, Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 855-56 (Ky. 1981). The KCHR therefore threatens to trample Club members' constitutional rights of privacy and free association during its investigation. In these circumstances, the TIA does not preclude the Clubs from vindicating First Amendment rights in federal court. *Northwest Airlines, Inc. v. Tennessee State Board of Equalization*, 11 F.3d 70 (6th Cir. 1993); *Barringer v. Griffes*, 964 F.2d 1278 (2d Cir. 1992); *Direct Marketing Assoc. v. Bennett*, 916 F.2d 1451 (9th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991).

B. Respondents' Administrative Complaints And Discovery Demands Violate The Rights Of Free Association That Club Members Enjoy Under The First And Fourteenth Amendments

Lacking immunity under the TIA, it is clear that Respondents' administrative complaints and discovery demands impermissibly violate the Clubs' members' rights of associational privacy under the First and Fourteenth Amendments. Initially

> freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights. Such relationships may take various forms, including the most intimate. We have not attempted to mark the precise boundaries of this type of constitutional protection. ... Of course, we have not held that constitutional protection is restricted to relationships among family members.

Rotary Club of Duarte, *supra* at 545 (citations omitted).

Of course, the fundamental right to define one's own identity necessarily includes the right to associate with those of one's own choosing. *See Roberts*, *supra* at 622 ("There can be no clearer example of an intrusion into the internal structure of the affairs of an organization than a regulation that forces the group to accept members it does not desire.") More specifically, this Court

> has recognized the vital relationship between freedom to associate and privacy in one's associations ... the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment.

NAACP v. Alabama, *supra* at 462, 466 (1958) (preventing state officials from obtaining membership lists during an investigation of NAACP eligibility to transact business within

the state).

In balancing the rights of individual freedom of association and the laudable goal of eradicating invidious discrimination from public life, courts **and** legislatures have drawn a distinction between private clubs, and organizations which properly might be considered public places subject to regulatory oversight:

> Discrimination can find no rest in a place of public accommodation. Whether it should be suffered to abide in private clubs is debatable among persons of good will. But the Constitution trumps; those clubs have a right of private association under the First Amendment with which the Government may not interfere impermissibly. Concomitantly, if those clubs must go public, in order to remain private, then their privacy rights ring hollow indeed; "the flame is not worth the candle."

Louisiana Debating, *supra*, 42 F.3d at 1500.

In this case, the First Amendment line between protected private association and permissible public intrusion is acknowledged in the Kentucky Civil Rights Act, KRS 344.120, which prohibits discriminatory practices and authorizes the KCHR to investigate and enforce the civil rights laws in "place[s] of public accommodation[.]" That term specifically is defined to **exclude** private clubs:

> A private club is not a place of public accommodation, resort, or amusement if its policies are determined by its members and its facilities or services are available only to its

> members and their *bona fide* guests[.]

KRS 344.130, App. T at 77a.

In this action, there is no dispute over whether the Clubs are "private" for purposes of Respondents' investigative authority. The KCHR determined that the Clubs were "private" in 1991, and that finding has never been overturned or reconsidered. Instead, Respondents have tried to justify the current KCHR investigation by engaging in hyperbolic speculation that private clubs generally are forums where

> many business deals are made ... the rich, the powerful, and the mainly white male elite of our society meet to eat, play golf and socialize among themselves ... the elite make contacts where they gain a business advantage over women and minorities historically excluded from such clubs.

"Brief of Appellants," at 38, filed with the U.S. Court of Appeals for the Sixth Circuit on March 24, 1998.

Respondents' apparent obsession with white male golfers is insufficient to justify their unprincipled invasion of the constitutionally protected associational and privacy rights of Club members. Indeed, the simple fact is that the KCHR has not taken **any** steps to re-examine its previous finding that the Clubs are private instead of being "places of public accommodation" subject to regulation under the Kentucky Civil Rights Act. Consequently, Respondents' effort to launch a wide-ranging investigation into the relationships between the Clubs and their members is prohibited under the First and Fourteenth Amendments, and not privileged by reason of the TIA.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

D. Patton Pelfrey
BROWN, TODD & HEYBURN PLLC
400 West Market St.
Suite 3200
Louisville, KY 40202
(502) 589-5400

Counsel of Record

Of Counsel:

Robert W. Dibert
BROWN, TODD & HEYBURN PLLC
400 West Market St.
Suite 3200
Louisville, KY 40202
(502) 589-5400
(Counsel for The Pendennis Club, Inc.)

Richard G. Griffith
STITES & HARBISON
2300 Lexington Financial Center
Lexington, KY 40507
(606) 226-2300
(Counsel for Idle Hour Country Club)

John O. Sheller
SMITH AND SMITH, ATTORNEYS
400 North First Trust Centre
200 South Fifth St.
Louisville, KY 40202
(502) 587-0761
(Counsel for Louisville Country Club)

APPENDIX A

[Filed: April 16, 1999]

NOT RECOMMENDED FOR PUBLICATION

Nos. 97-5758 & 97-5829

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LOUISVILLE COUNTRY CLUB, a Kentucky Corporation on behalf of itself and all its members; et al., **Plaintiffs-Appellees, Cross-Appellants,**	)	
v.	)	**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY**
BEVERLY L. WATTS, in her official capacity as Director of the Kentucky Commission on Human Rights; et al., **Defendants-Appellants, Cross-Appellees.**	)	**OPINION**

BEFORE: KEITH, MERRITT, and NORRIS, Circuit Judges.

PER CURIAM. In 1991, the Reverend Louis Coleman filed a complaint with the Kentucky Commission on Human Rights ("KCHR") alleging that plaintiffs in this cause, the Louisville Country Club, the Idle Hour Country Club, and the Pendennis Club, Incorporated, denied him membership because of his race. The complaints alleged violations of Ky. Rev. Stat. Ann. § 344.120 (Banks-Baldwin 1999) and § 141.010(l 1) & (13)(f). Section 344.120 prohibits racial discrimination by certain types of organizations, while § 141.010 forbids tax deductions for organizations that discriminate. The KCHR later determined that it lacked jurisdiction over plaintiffs because they were private social clubs as defined by § 344.130.

At the request of a State General Assembly Representative, the Kentucky Attorney General reviewed the KCHR's interpretation of its jurisdiction. The Attorney General disagreed with the KCHR's interpretation, concluding that the KCHR's authority to investigate whether an organization had racially discriminated for purposes of the tax statutes is not limited by §344.130. Subsequent to the Attorney General's opinion, then-Commissioner Mae Cleveland filed identical "commissioner-complaints" against plaintiffs, and the KCHR began an investigation of the matter.

In May, 1995, plaintiffs filed suit in federal district court against the KCHR and its Commissioners pursuant to 42 U.S.C. §§ 1983 and 1988, seeking a declaration either that the implementation of a Kentucky anti-discrimination tax law

violated plaintiffs' First Amendment rights of free association or that the KCHR had exceeded its statutory authority in investigating plaintiffs. Plaintiffs also sought an injunction preventing defendants' investigation and claimed costs and attorney fees pursuant to 42 U.S.C. § 1988.

Defendants moved to dismiss the action. The district court granted the motion with regard to the KCHR itself, finding that it is not a "person" for the purposes of 42 U.S. C. § 1983. The court also dismissed plaintiffs' claims to the extent that they required a ruling on the constitutionality of portions of the Kentucky Revenue Code. However, the court ruled that the Tax Injunction Act does not bar the court's consideration of the limitation imposed by § 344.130. on KCHR's jurisdiction, that it should not decline jurisdiction based upon the abstention doctrine set forth in *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), and that it should not certify the statutory interpretation question to the Supreme Court of Kentucky.

The parties then briefed the remaining claims, and the district court entered summary judgment for plaintiffs, ruling that § 141.010 is not a grant of jurisdiction to the KCHR and thus that the KCHR's jurisdiction in § 141.010 determinations is limited to its authority under §344.130. Defendants appeal the district court's ruling concerning the Tax Injunction Act, abstention, and certification and the court's grant of summary judgment for plaintiffs. Plaintiffs cross-appeal the district court's dismissal of their claims concerning the constitutionality of the Kentucky tax statutes.

We conclude that the district court improperly adjudicated plaintiffs' claim in light of the abstention doctrine created by *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. Although neither party argued *Younger* abstention before the district court or on appeal, *Younger* abstention is properly raised *sua sponte* at any point in the appellate process. *Bellotti v. Baird*, 428 U.S. 132,143 n. 10 (1976); *Federal Express Corp. v. Tennessee Public Serv. Comm'n*, 925 F.2d 962, 966 (6th Cir. 1991).

The *Younger* doctrine, in its original form, maintains that abstention is appropriate where federal jurisdiction has been invoked for the purpose of restraining an ongoing state criminal proceeding. *Sun Refining & Marketing Co. v. Brennan*, 921 F. 2d 635, 639 (6th Cir. 1990). At the heart of *Younger* abstention is the notion of comity, that is, "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger*, 401 U.S. at 44.

In Middlesex Country Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982), the Supreme Court articulated the following three-pronged test for determining when *Younger* abstention is appropriate in noncriminal proceedings: (1) Are there ongoing state judicial proceedings?; (2) Do the proceedings implicate important state interests?; and (3) Is there an adequate opportunity in the state proceedings to raise

constitutional challenges? Id. at 43 2. Each of these requirements is met in the instant action.

The proper time from which to judge the applicability of *Younger* abstention is the date at which the federal complaint was filed. *Carras v. Williams,* 807 F.2d 1286, 1290 n. 7 (6th Cir. 1986). In the present case, plaintiffs filed suit in hopes of enjoining defendants, an administrative agency and its commissioners, from conducting an official inquiry into alleged civil rights wrongdoing. An administrative agency proceeding such as that brought by the KCHR will be characterized as either judicial or legislative for purposes of the *Younger* analysis depending upon the nature of the final act that the proceeding is designed to produce. *New Orleans Public Serv., Inc. v. Council of City of New Orleans,* 491 U.S. 350, 370 (1989). A proceeding is judicial where it "investigates, declares and enforces liabilities as they stand on present and past facts and under laws supposed already to exist." Id (quoting *Prentis v. Atlantic Coastline Co.,* 211 U. S. 210, 226(1908)). Here, KCHR's investigation of plaintiffs is clearly part of a judicial proceeding that will, if fruitful, result in full prosecution of plaintiffs under existing Kentucky civil rights law.

Furthermore, the proceedings against plaintiffs implicate important state interests. *Cf. Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.,* 477 U.S. 619, 628 (1986) (finding that "the elimination of prohibited sex discrimination is a sufficiently important state interest" to bring the case within the ambit of the *Younger* precedent).

Finally, plaintiffs have adequate opportunity to challenge the constitutionality of the KCHR proceeding, if not during the administrative proceeding itself, then in a subsequent or even concurrent appeal to the Kentucky courts. *See* Ky. Rev. Stat. Ann. § 344.240(l) (Banks-Baldwin 1999) (providing state judicial review of any final order given by the KCHR); *see also Watts v. Burkhart*, 854 F.2d 839, 848 (6th Cir. 1988) (holding that where state administrative proceedings would not afford the opportunity to raise constitutional claims, it is sufficient to satisfy the third prong of *Middlesex* that constitutional claims may be raised upon state court review of the administrative proceeding).

Accordingly, we conclude that, under the circumstances of this case, the district court should have abstained, under the doctrine announced in *Younger*, from asserting jurisdiction over the cause. We therefore **vacate** the decisions of the district court.

APPENDIX B

[Filed: May 13, 1997]

UNITED STATES DISTRICT COURT
EASTERN DISTRIC OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 95-48

LOUISVILLE COUNTRY CLUB, ET AL., PLAINTIFFS,

V. **JUDGMENT**

KENTUCKY COMMISSION ON
HUMAN RIGHTS, ET AL., DEFENDANTS.

* * * * * *

In conformity with the Memorandum Opinion and Order of even date,

IT IS ORDERED that this matter be, and the same hereby is, **DISMISSED WITH PREJUDICE** and **STRICKEN FROM THE COURT'S ACTIVE DOCKET.** The plaintiffs are awarded costs pursuant to Fed. R. Civ. P. 54(d). This is a final and appealable Order, and there is no just cause for delay.

This the 13th day of May, 1997.

/s/
JOSEPH M. HOOD, JUDGE

Date of Entry and Service: /s/ 5-13-97

APPENDIX C

[Filed: May 13, 1997]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 95-48

LOUISVILLE COUNTRY
CLUB, ET AL., PLAINTIFFS,

V. **MEMORANDUM OPINION AND ORDER**

KENTUCKY COMMISSION ON
HUMAN RIGHTS, ET AL., DEFENDANTS.

* * * * * *

The plaintiffs have moved for summary judgment in the above-styled action [Record No. 35]. Being fully briefed, these matters are ripe for decision. Having reviewed the record and the memoranda submitted by the parties, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The plaintiffs [Clubs] filed the instant action seeking declaratory and injunctive relief under 42 U.S.C. § 1983 and § 1988, for alleged violation of their federal constitutional rights

under the First and Fourteenth Amendment of the United States Constitution. The Clubs complain that the defendants [Commission] "have engaged, and seek to continue to engage, in an improper investigation of the Clubs' membership admission practices. The Clubs allege that such an investigation is neither constitutionally permissible nor statutorily authorized." Plaintiffs' Memorandum for Summary Judgment at p.1.

The Commission's investigation began when a former member of the Commission, Ms. Cleveland, filed complaints of discrimination against the Clubs. The complaints alleged that the Clubs were engaging in discriminatory practices. Thus, the Commission sought to investigate the Clubs pursuant to KRS 344.120 and KRS 141.010(11)(d) and (13)(f).

Commencing the investigation, the Commission, then, tendered a request for information from the Clubs and a public hearing was set. In response, the Clubs filed a motion to dismiss, arguing that the Commission lacked jurisdiction/authority to investigate the Clubs.

At the hearing, interestingly, the Commission's own attorney agreed with the Clubs' position, recommending that the Commission dismiss the complaints for lack of jurisdiction. See Plaintiffs' Complaint, Exhibit G at pp. 23-27 and Exhibit H at p. 1. The Commission, however, declined to adopt their attorney's recommendation and instead held that the Commission had authority to investigate the Clubs based on KRS 141.010(11)(d) and (13)(f). See Plaintiffs' Complaint, Exhibit H at pp. 4 & 6-8. In response, the Clubs initiated this action, seeking to stop the Commission from infringing on their members' right to free association.

The Clubs now move for summary judgment, arguing that the Commission may not investigate their membership roles without first determining that the Clubs are "public accommodations", and not "private". The Clubs submit that such determination must be made because, under KRS 344.130, private clubs are exempt from investigation under Kentucky's Civil Rights Act.

The Commission responds, arguing that they have the power to investigate the Clubs under KRS 141.010(11)(d) and (13)(f) without first determining whether the clubs are "private"; the Commission contends that the "private" status exemption does not apply to an investigation under KRS 141.010(11)(d)and (13)(f).[1] The Commission reasons that it "has limited statutory authority under the Revenue statutes [KRS 141.010 (11)(d) and (13)(f)] to investigate a 'private club' in order to determine whether it is engaged in discriminatory membership practices, so that its members may not have their membership dues and other expenses subsidized by the Kentucky tax code." Defendants' Response at pp. 4-5.

CONCLUSIONS OF LAW

KRS 141.010(11)(d) prohibits the deduction from "net income" by taxpayers of any amount:

> paid to any club, organization, or establishment which has been determined by the courts or an agency established by the General Assembly and charged with enforcing the civil rights laws

---

[1] Since the Commission acknowledges that "private" clubs are exempt from investigation under the Civil Rights Act, Chapter 344, the sole issue to be determined is whether the Commission can investigate "private" clubs under KRS 141.010. See Defendants' Response at pp. 5-6.

> of the Commonwealth, not to afford full and equal membership and full and equal enjoyment of its goods, services, facilities, privileges, advantages or accommodations to any person because of race, color, religion, national origin, or sex . . . .

Similarly, KRS 141.010(13)(f) prohibits the same deductions by corporations. Thus, if a club has been determined to engage in the discriminatory practices listed in these tax statutes, the members of that club may not take deductions for their club dues.[2]

Based on KRS 141.010(11)(d) and (13)(f), the Commission argues that it has authority to investigate and determine whether the Clubs are engaging in any such discriminatory practices, and thus identify any taxpayers who should not get tax breaks due to their membership in such clubs. In support, the Commission highlights the language in

---

[2] Notably, the Internal Revenue Code does not allow deductions for any "amounts paid or incurred for membership in any club organized for business, pleasure, recreation, or other social purpose." 26 U.S.C. § 274. Thus, any investigation premised on the ability for a club member to take a deduction for his or her club dues appears to be moot.

KRS 141.010(11) states that "net income" means adjusted gross income minus "the standard deduction allowed by KRS 141.081, or, at the option of the taxpayer, minus the deduction allowed by KRS 141.0202 **and minus all the deductions allowed individuals by Chapter 1 of the Internal Revenue Code as modified by KRS 141.0101 except those listed below . . .** ", and KRS 141.010(13) states that "net income" means gross income minus "the deduction allowed by KRS 141.0202 **and minus all the deductions from gross income allowed by corporations by Chapter 1 of the Internal Revenue Code and as modified by KRS 141.0101, except the following . . . .**" 26 U.S.C. § 274 falls under Chapter 1 of the Internal Revenue Code; thus, a deduction for club dues does not appear allowable under Kentucky's tax code.

KRS 141.010(11)(d) and (13)(f) which refers to the Commission's determination that a club is not affording full and equal membership or enjoyment of goods, services, facilities, privileges, advantages, or accommodations.

As noted, the Clubs argue that KRS 141.010(11)(d) and (13)(f) do not give the Commission independent authority to determine whether private clubs afford full and fair membership and full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations; instead, the Clubs submit that the Commission's authority stems only from the Kentucky Civil Right's Act, Chapter 344, which established the Commission. The Court agrees.

The Court holds that the Commission does not have independent authority to investigate the Clubs pursuant to KRS 141.010 (11)(d) and (13)(f). The Civil Rights Act, Chapter 344, solely grants the Commission authority, to act.[3] The Commission "is a statutorily created body with specifically designated powers and duties." Martin v. Commonwealth

---

[3] See KRS 344.150 (establishing the Commission); KRS 344.180 (listing the Commission's powers and duties) KRS 344.190(8) (listing additional powers and duties); KRS 344.230(2) (stating the Commission's power to order); 344.250(1) (stating the power to investigate and examine records).

These statutes consistently refer to the Commissions' power to act **under this chapter.** For example, KRS 344.190(8)(emphasis added) states that the Commission has the power and duty to "receive, initiate, investigate, seek to conciliate, hold hearings on, and pass, upon complaints **alleging violations of this chapter**." Likewise, KRS 344.230(2)(emphasis added) states that if unlawful discrimination is found, the Commission "shall issue a final order requiring the respondent to cease and desist from the unlawful practice and to take affirmative action as in the judgment of the commission **will carry out the purposes of this chapter**." Lastly, KRS 344.250(1) (emphasis added) allows the Commission to "request access to premises, records, and documents relevant to the complaint" pursuant to "an investigation of a complaint **filed under this chapter.**"

Personnel Bd., 711 S.W.2d 866, 867 (Ky. Ct. App. 1986); see also Pyro Mining Co. v. Kentucky Comm'n on Human Rights, 678 S.W.2d 393, 394 (Ky. 1984).

Under Chapter 344, the Commission must determine whether the Clubs are "private" in nature[4]; KRS 344.120 only prohibits discrimination in places of "public accommodation". Since private clubs, then, cannot unlawfully discriminate, they are exempt from investigation by the Commission.[5]

As the Commission only receives its power to act from the Civil Rights Act, the Commission has no authority to act under KRS 141.010[6]; the tax statute does not authorize the Commission to act. Instead, the Revenue Cabinet is the administrative agency which is authorized to enforce the tax code.

Although KRS 141.010(11)(d) and (13)(f) make reference to the Commission's authority to determine that a club is engaging in discriminatory practices, the Revenue Code does not grant the Commission the authority to act under the Code; in fact, the language used by the tax statute emphasizes the Commission's limited authority to act. The language clearly

---

[4] KRS 344.130 provides that "[a] private club is not a place of public accommodation, resort, or amusement if its policies are determined by its members and its facilities and services are available only to its members and their bona fide guests."

[5] Kentucky's Civil Rights Act, Chapter 344, implicitly recognizes a private persons right to free association under the First Amendment.

[6] If the Commission tried to act under KRS 141.010 (11)(d) and (13)(f), the Commission could be said to be usurping the power it has been granted under Chapter 344. See Martin, 711 S.W.2d at 868 (stating that if the Commission tried to delegate power it had not been authorized to delegate, "such a delegation would be invalid as a regulatory attempt to **alter or enlarge the terms of Chapter 344**") (emphasis added).

states that the determination of discrimination is made by the "agency established by the General Assembly and charged with **enforcing the civil rights laws** of the Commonwealth."[7] KRS 141.010(11)(d) & (13)(f) (emphasis added). Thus, the Commission's ability to determine whether the club is engaging in discriminatory practices still stems only from its power under the Civil Rights Act, Chapter 344.

In sum, until the tax code grants the Commission power-to act under its provision, the Commission's only power comes from Chapter 344. Because the Commission's power stems from the Civil Rights Act, the Commission may only investigate a club once the club is determined to be a place of "public accommodation". Since the Commission has not made such a determination, the Clubs are entitled to injunctive relief, and summary judgment must be granted. Accordingly,

IT IS ORDERED HEREIN,

(1) The plaintiffs, motion for summary judgment [Record No. 35] be, and the same hereby is, **GRANTED;**

---

[7] KRS 141.010 (11)(d) and (13)(f) allow the Revenue Cabinet to disallow any deductions for a club membership when the club has been determined to engage in discriminatory practices by either (1) a court or (2) an agency established and charged with enforcing the civil rights laws of Kentucky, i.e. Chapter 344. The Court finds the designation of the above two bodies enlightening. The legislature named both the Court and the Commission as the bodies which are capable of determining whether a club is engaging in discriminatory conduct because the legislature was aware that the Commission could not determine whether a private club was engaging in discriminatory practices due to the "public accommodation" limitation in KRS 344.120. Thus, the only body which could determine whether a "private" club was engaging in discriminatory practice would be a court. Consequently, this language reinforces the Court's determination that KRS 141.010(11)(d) and (13)(f) do not grant the Commission the power to determine whether a "private" club is engaging in discriminatory practices.

(2) The plaintiffs' motion for a pretrial conference and oral arguments on the summary judgment motion [Record No. 43] be, and the same hereby is, **DENIED AS MOOT.**

(3) The plaintiffs be, and the same hereby are, **AWARDED** costs and attorney's fees pursuant to 42 U.S.C. § 1988.

(4) The plaintiffs shall **SUBMIT** a statement of costs and attorney's fees no later than Friday, May 23, 1997.

(5) The defendants shall have until Friday, June 6, 1997, to submit any objections to the statement of costs and attorney's fees.

(6) This matter be, and the same hereby is, **DISMISSED WITH PREJUDICE** and **STRICKEN** from the Court's Active Docket.

(7) A final Judgment shall be entered contemporaneously herewith.

This the 13th day of May, 1997.

/s/
JOSEPH M. HOOD, JUDGE

Date of Entry and Service: /s/ 5-13-97

APPENDIX D

[Filed: February 6, 1996]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 95-48

LOUISVILLE COUNTRY
CLUB, ET AL., PLAINTIFFS,

V. **MEMORANDUM OPINION AND ORDER**

KENTUCKY COMMISSION ON
HUMAN RIGHTS, ET AL., DEFENDANTS.

* * * * * *

The defendants, by and through counsel, having moved to dismiss the above-styled action [Record No. 9], or in the alternative to certify a particular question of Kentucky law to the Kentucky Supreme Court [Record No. 17], and being fully briefed, these matters are ripe for decision. As the facts applicable to the instant motion are not in dispute, the Court adopts the factual background set forth by the parties in their respective briefs.

DISCUSSION

The plaintiffs [Clubs] filed the instant action under 42 U.S.C. § 1983 and § 1988, seeking a declaratory judgment on the constitutionality of KRS 141.010(11)(d), (13)(f), and various provisions of KRS 344, as interpreted and applied by the defendants. The Clubs also seek corresponding injunctive relief, costs and attorneys fees. The Clubs have named the defendants in their official capacities only.

As grounds for the instant motion, the defendants contend: (1) that the defendant Kentucky Commission on Human Rights [Commission] must be dismissed as it enjoys absolute Eleventh Amendment immunity, (2) that the court lacks jurisdiction over the defendant Mae Smith Cleveland [Cleveland], (3) that 28 U.S.C. § 1341 prohibits this Court from entering a declaratory judgment or granting injunctive relief regarding KRS 14 1.010(11)(d), 13(f), (4) that the Clubs do not have organizational standing to bring the instant action, and that (5) this Court should abstain from considering this matter pursuant to Railroad Commission v. Pullman Co., 312 U.S. 469 (1941).

I. Will v. Michigan Department of State Police

It is undisputed that the Commission is a state subdivision. In Will v. Michigan Department of State Police, the United States Supreme Court held that states and state subdivisions are not persons under 42 U.S.C. § 1983. The Court subsequently held that the Will decision did not "import the entirety of our Eleventh Amendment jurisprudence into the area of statutory construction", but simply "treated the Eleventh Amendment as a relevant consideration" and that therefore, a "wavier of immunity" by the state "does not result in the conferral of amenability to suit under § 1983." Hilton v. South

Carolina Pub. Ry. Comm'n, 112 S.Ct. 560, 565 (1991), and Howlett ex rel. Howlette v. Rose, 496 U.S. 356, 376 (1990). Thus, regardless of any argument concerning waiver of sovereign immunity, the Commission is not subject to suit under 42 U.S.C. § 1983 as it is not a "person" for the purposes, of the statute. Accordingly, the Commission must be dismissed from this action.

II. PROPER PARTY IN INTEREST

A proper party defendant to a suit is one which may afford the relief requested. The Clubs request declaratory and injunctive relief in this action. It is undisputed that Cleveland is no longer a member of the Commission. The Clubs cannot dispute that Cleveland does not have the authority to grant injunctive relief, if ever ordered to do so. Only this Court may award declaratory relief and only the members of the commission can fulfill any injunctive relief awarded.

Moreover, in the event the Court awards costs and attorneys fees in this action, such award will necessarily be paid by the state, and could not be collected from Cleveland individually as she has been sued in her former official capacity. Thus, Cleveland is not a proper party in interest to this action and must be dismissed.

III. THE TAX INJUNCTION ACT - 28 U.S.C. § 1341

The Tax Injunction Act [TIA] prohibits this Court from enjoining, suspending, or restraining the "assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. Consequently, the statute prohibits this Court from issuing a declaratory judgment holding state tax laws

unconstitutional. California v. Grace Brethren Church, 457 U.S. 393 (1982). The TIA is liberally construed and prohibits injunctive relief which directly, or indirectly, affects a state's power to assess, levy or collect taxes. See, Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F.2d 212 (D.C. Cir.), cert denied, 326 U.S. 721 (1944).

The Clubs contend that KRS 141.010(11)(d), 13(f) is unconstitutional as interpreted by the commission, and as enforced by the Commission's members. The Commission does not argue that its interpretation of the statute is different from that asserted as unconstitutional, but contends that any injunctive relief afforded by this Court would indirectly affect Kentucky's ability to assess and levy taxes under KRS 141.010(11)(d), 13(f).

KRS 141.010(11)(d) prohibits the deduction from "net income" by taxpayers other than corporations of any amount:

> paid to any club, organization, or establishment which has been determined by the courts or an agency established by the General Assembly and charged with enforcing the civil rights laws of the Commonwealth, not to afford full and equal membership and full and equal enjoyment of its goods, services, facilities, privileges, advantages or accommodations to any person because of race, color, religion, national origin, or sex . . . .

Similarly, KRS 141.010(13)(f) prohibits the same deductions by corporations. The Clubs argue that the Commission does not have the authority to determine whether private clubs afford full and fair membership and full and equal enjoyment of goods, services, facilities, privileges, advantages,

or accommodations. The defendants argue that Count III must be dismissed as it explicitly requests a declaratory judgment addressing the constitutionality of Kentucky's tax statutes. They also aver that any ruling on the constitutionality of the Kentucky Civil Rights Act [Civil Rights Act] will indirectly affect the enforcement of KRS 141.010(11)(d), (13)(f). The Commission argues that in order for this Court to entertain the instant complaint, it will be necessary to consider whether the Commission has the authority under the tax statutes to determine what entities afford full and fair membership and full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations.

To the extent Count III of the Clubs' complaint requests a declaratory judgment addressing the constitutionality of Kentucky's tax statutes, the TIA requires dismissal. The argument that any decision as to the Civil Rights Act will affect the tax statutes, however, is not compelling.

The Clubs seek a declaratory judgment as to the constitutionality of various provisions of the Civil Rights Act, as applied by the Commission. In addressing this issue, the Court will not need to analyze Kentucky's tax statutes on their face, or in any other manner. The Civil Rights Act provides an adequate basis upon which to determine whether the commission acted in violation of the Clubs' constitutional rights. While it is true that a ruling in favor of the Clubs on Count II of the complaint may require that the defendants **interpret** the tax statutes differently than it has in the past, such a ruling could not conceivably inhibit Kentucky's ability to assess, levy or collect taxes, as envisioned by the TIA.[8]

---

[8] The defendants cannot seriously argue that Kentucky's tax statutes are placed in issue by Count I of the Clubs' complaint. The primary issues raised in the complaint are: (1) whether the Commission's actions in

Accordingly, Blangeres v. Burlington Northern, 872 F.2d 327 (9th Cir. 1989) is distinguishable from the instant action.[9]

Thus, the portion of Count III which requests a declaratory judgment as to the constitutionality of KRS 141.010(11)(d), (13)(f) must be dismissed. Moreover, this court cannot enjoin the Commission from prosecuting a complaint under the Kentucky Revenue Code. Yet, for the reasons given above, any determination regarding the Civil Rights Act may only affect the statutory construction of the tax statutes and will not interfere with state revenue collection procedures, and thus, the Clubs' remaining claims will survive the instant motion on this ground.

III. ORGANIZATIONAL STANDING

The parties contend that there is a split among the circuit courts of appeals regarding the scope of organizational standing. The test applied to determine the standing conferred

---

attempting to obtain certain statistics from the Clubs are in violation of the constitution; and (2) whether the Civil Rights Act is constitutional if interpreted as conferring authority upon the Commission to investigate private clubs upon receipt of a discrimination complaint. The Kentucky Revenue code is undisputedly secondary in the complaint, and the claims regarding it may be dismissed without affecting the availability of a decision on the constitutionality of the Civil Rights Act, as applied by the Commission.

[9] The defendants' reliance on Blangeres is misplaced. The Ninth Circuit Court of Appeals held that the TIA prohibited an order enjoining Burlington Northern from providing certain employee tax records to the Idaho and Montana tax authorities. Thus, the facts in Blangeres distinguish it from the instant action. Moreover, the court in Blangeres did not address the narrow issue before this Court: whether the TIA prohibits statutory construction of a statue, which construction may affect the interpretation of a state's tax statute.

upon organizations by virtue of its members, however, is the same as applied by all courts.

The United States Supreme Court recognized the growing need for the development of organizational standing in Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1986), holding:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests its seeks to protect are germane to the organization purpose; and (c) neither the claim nor the asserted relief requested requires the participation of individual members in the lawsuit.

Subsequently, the Supreme Court granted third party "organizational" standing to an association of private clubs in New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988).

The defendants do not dispute that the Clubs' individual members would have standing to bring suit on the issues raised herein. Moreover, the interest asserted, privacy of association, is certainly germane to a private club's organizational purpose. The defendants urge this Court to find either that the presence of the individual members will be necessary for effective discovery in this action, or, that a "conflict of interest " among the members is enough to strip the Clubs of organizational standing.

The Fourth Circuit held that a split between an organization's members creates a "conflict of interest" which requires members to participate individually to protect their

own interests. See, Maryland Highways Contractors Ass'n v. Maryland, 933 F.2d 1401 (4th Cir.), cert denied, 112 S.Ct. 373 (1991). In Associated General Contractors of California Inc. v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991), cert denied, 112 S.Ct. 1670 (1992), the Ninth Circuit Court of Appeals declined to adopt the Fourth Circuit's reasoning, holding that a conflict of interests between members does not deny standing as unanimous opinions within a membership will be "few and far between" with regard to most issues controversial enough to engender litigation.

This Court finds the reasoning employed by the Ninth Circuit most persuasive. The Court in Hunt did not consider whether a conflict of interest between members affected an organization's ability to bring suit on its own behalf, as well as in the interest of its members. Clearly, this issue was not addressed because the second prong of the test enunciated in Hunt sufficiently considers the potential problem identified by the defendants. Thus, the only question remaining is whether the claims asserted or relief requested by the Clubs require proof from the individual members.

The defendants argue that proof from the individual members is necessary so that discovery can be made on the degree of exclusiveness in membership policies, i.e. so the Court may determine whether the Clubs are truly "private." The defendants concede, however, that such a determination, may be made upon consideration of objective factors such as the number of individual members and the use of club facilities for business purposes. Moreover, KRS 344.130 provides that "[a] private club is not a place of public accommodation, resort, or amusement if its policies are determined by its members and its facilities and services are available only to its members and their bona fide guests."

Thus, to the extent that the Clubs' organizational characteristics are an issue, the facts needed to make such a determination are clearly defined and can be discovered from the Clubs' representatives. Accordingly, the presence of the individual members is not required here, and each prong of the test set forth by the Court in Hunt has been met. The Clubs have organizational standing to bring the claims asserted.

IV. PULLMAN ABSTENTION

Under the doctrine established in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), federal courts "should abstain when construction of an unclear state statute would obviate the necessity for a decision on the federal constitutional question." Heitmanis v. Austin, 899 F.2d 521, 525 (6th Cir. 1990). Thus, where the state statute at issue is unambiguous or where construction does not render the constitutional questions moot, abstention is not appropriate.

The defendants argue that KRS 141.010(11)(d), (13)(f) and the relevant provisions of the Civil Rights Act, read together, are ambiguous and thus, the first prong of the Pullman doctrine is satisfied. The defendants further argue that a determination of the scope of the Commission's authority will obviate the need to address the Clubs' constitutional claims.

This Court noted above that the claims asserted regarding Kentucky's tax statutes are peripheral to the pivotal question before the Court, but nonetheless are barred by the TIA and will not be considered. Thus, any ambiguity perceived by a reading of the tax and civil rights statutes together is irrelevant, as Kentucky's tax statute will not be analyzed by this Court. Moreover, the Court does not see the patent "ambiguity" in the language of KRS 344.

Furthermore, Count I of the Clubs' complaint alleges that the Commission's investigation of the Clubs as evidenced by requests for particular documents violates the Clubs' constitutional rights under the First and Fourteenth Amendments. A determination of whether the Commission has authority to investigate private clubs will not necessarily obviate the consideration of whether the actions taken by the defendants thus far are unconstitutional. Thus, as abstention is the "exception not the rule", and as the present controversy is properly before this Court, the Court declines to exercise its discretion in abstaining to consider the claims presented herein. Colorado River Water Constr. Dist. v. United States, 424 U.S. 800, 813 (1976). Moreover, for the reasons set forth above, certification of the question presented by the defendants is not necessary as this Court is capable of determining whether the defendants' investigative measures, as well, as their interpretation of the Civil Rights Act, are constitutional.

Accordingly,

IT IS ORDERED HEREIN,

(1) That the defendants' motion to dismiss [Record No. 9] be, and the same hereby is, **GRANTED IN PART** and **DENIED IN PART;**

(2) That the defendant Kentucky Commission on Human Rights be, and the same hereby is, **DISMISSED**;

(3) That the defendant Mae Smith Cleveland be, and the same hereby is, **DISMISSED**;

(4) That Count III of the plaintiffs' complaint, to the extent it questions the constitutionality of the Kentucky

Revenue Code, be, and the same hereby is **DISMISSED** as required by the Tax Injunction Act;

(5) That the defendants' motion to certify the question regarding the Kentucky Revenue Code to the Kentucky Supreme Court [Record No. 17] be, and the same hereby is, **DENIED**.

This the 6th day of February, 1996.

/s/
JOSEPH M. HOOD, JUDGE

Date of Entry and Service: 2-7-96

APPENDIX E

[Filed: March 15, 1995]

COMMONWEALTH OF KENTUCKY
KENTUCKY COMMISSION ON HUMAN RIGHTS
Complaint Nos. 256-PA, 257-PA, & 258-PA

In the Matter of:

COMMISSIONER MAE CLEVELAND COMPLAINANT

V.

LOUISVILLE COUNTRY CLUB;
THE PENDENNIS CLUB, AND
IDLE HOUR COUNTRY CLUB RESPONDENTS

CONCLUSIONS OF LAW
AND ORDER

*** *** *** *** *** ***

This matter is before the Kentucky Commission on Human Rights on Respondents' Motion to Dismiss three complaints filed by Commissioner Mae Cleveland, an African American woman, charging unlawful discriminatory membership practices. In their motion to dismiss, the Respondent country clubs assert that "1) the Commission lacks subject matter jurisdiction over this matter, and 2) the Commission lacks personal jurisdiction over the Respondents." (Respondents' motion to dismiss, June 22, 1994). Commission

staff has filed a responsive memoranda in which it agreed that the complaints against Respondents should be dismissed for lack of jurisdiction, but without prejudice. In addition to the extensive memoranda filed on this issue, the Commision has considered the oral arguments presented by counsel on December 9, 1994. Having before it, at this time, the limited issue of jurisdiction, and the Commission being otherwise sufficiently advised, The Kentucky Commission on Human Rights finds the following conclusions of law.

CONCLUSIONS OF LAW

The question raised by Respondent's Motion to dismiss is whether this Commission may maintain subject matter jurisdiction over the Respondents in order to determine whether they discriminated against the complainant in membership selection.

KRS §344.230 provides that "if the commission determines that the respondent has not engaged in an unlawful practice, the commission shall state its findings of fact and conclusions of law and shall issue an order dismissing the complaint." In essence, Respondents argue that the Commission must dismiss the complaints herein because, even if this commission finds that its membership practices are discriminatory, such discrimination does not constitute "unlawful" discrimination under present Kentucky law, as "private clubs" are specifically exempt from the Civil Rights Act's coverage. KRS §344.130. The Kentucky Civil Rights Act clearly provides that

> [I]t is an unlawful practice for a person to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of

> public accommodation . . . on the ground of . . . race . . . .

KRS § 344.120.

However, KRS §344.130 specifically provides that "[a] private club is not a place of public accommodation . . . . if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests . . . . Id. "By its statuatory definition, a private club is discriminatory, as its membership is selective. Although this Commission strongly believes that allowing private clubs to exclude classes of persons on the basis of race is detrimental to our purpose of safeguarding "all individuals within the state from discrimination because of . . . race," KRS §344.020(1)(b), such discrimination is Clearly not "unlawful" under KRS §344.130 as private clubs are specifically exempt from the Civil Rights Act.

This Commission fully recognizes that discriminatory membership policies "literally relegate women and minorities to side doors and back rooms, perpetuating their treatment as second class citizens that bears no relation to their actual abilities." Parker, Membership Has Its Privileges, 8 Cal. Law (June 1988). Membership in private clubs can be an important source of business opportunity. In many small communities, private clubs may hold a monopoly in a particular type of recreational facility from which otherwise protected classes of persons are excluded.

However, in the absence of legislative authority, this commission may not take affirmative action under KRS §344.230 to force Respondents to admit Commissioner Cleveland to their membership or award any damages resulting from any injury she may have suffered as a result of any

discriminatory practices. We can not deem a private club's discriminatory practices to be unlawful when the Legislature has not made those practices unlawful. The subject-matter jurisdiction of this Commission is "limited solely to that granted by the Legislature." Auxier v. Commonwealth of Kentucky Board of Embalmers and Funeral Directors, Ky. App., 553 S.W.2d 286, 288 (1972).

Although this Commission clearly has not been granted the statuatory authority to enforce the Kentucky Civil Rights Laws against the Respondents, the General Assembly has granted us authority to make a determination of discrimination for other purposes. The Legislature has chosen to exempt private clubs from The Civil Rights Act. However, it has also made clear that the citizens and state of Kentucky will not subsidize or condone any discriminatory practices by permitting income tax deductions for amounts paid by taxpayers to private clubs which engage in discriminatory membership practices. Subsequent to the enactment of the "private club" exemption found in KRS §344.020(1)(b), the Kentucky General Assembly enacted KRS §141.010(d) (amended 1990), which disallows

> [a]ny deduction for amounts paid to any club, organization, or establishment which has been determined by . . . an agency established by the General Assembly and charged with enforcing the civil rights laws of the Commonwealth, not to afford full and equal membership and full and equal enjoyment of its goods, services, facilities, privileges, advantages or accommodations to any person because of race, color, religion, national origin, or sex . . . .

Id. (emphasis added).

In essence, the Kentucky General Assembly has determined that certain government-regulated privileges, such as tax benefits, may be withheld from private clubs that discriminate.[1]

The question we confront is whether this Commission has the statuatory authority to maintain a complaint alleging discriminatory membership practices of a private club, for the limited purpose stated in the Kentucky Revenue Code. In order to resolve that question, we have examined the language of the statute. On the other hand, the Civil Rights Act precludes us from making a determination that any discriminatory practice on the part of a private club is unlawful. KRS §344.130.

On the other hand, the Legislature has made it clear that no tax exemption will be allowed for monies paid to private clubs which discriminate on the basis of race, gender, and the other protected classes enumerated in KRS Chapter 344 and that the Kentucky Human Rights Commission shall make that determination. KRS §141.010(d).

The General Assembly has determined that "[a]ll statutes shall be liberally construed with a view to promote their objects and carry out the intent of the legislature . . . ." KRS §446.080. All provisions of statutes must be harmonized if it can be reasonably done, and effect and enforcement given to each clause, unless the provision of the statutes are irreconcilably incongruous. Ross v. Board of Educ., 196 Ky. 366, 244 S.W. 793 (1922).

"A universally accepted rule of statuatory construction is that the General Assembly is presumed to know the status of the law and the construction placed on it by the courts." Butler v. Groce, Ky. 880 S.W.2d 547 (1994) (citing Baker v. White, 251 Ky. 691, 65 S.W.2d 1022 (1933)). Therefore, we must

presume that the General Assembly was well aware of the private club exemption contained in the Civil Rights Act when it enacted or amended The Kentucky Revenue Code.

In construing a statute, it must be presumed that the Legislature intended something by what it attempted to do. Id.; Grieb v. National Bond and Invest Co., 264 Ky. 289, 94 S.W.2d 612 (1936). A statute will not be construed so as to lead to an absurd conclusion. Hamilton v. International Union of Operating Engineers, Ky. App., 262 S.W.2d 695 (1953). It will not be presumed that the legislature intended a useless or futile thing. Id. Moreover, where two statutes are not repugnant to each other, although they may deal to some extent with matters pertaining to the same subject, and each can be enforced consistently with the provisions of each other, courts will enforce the provisions of each. Newport Benev. Burial Assn. v. Clay, Ky., 186 S.W. 658, 662 (1916).

When the foregoing rules of statuatory construction are applied in the case, we find that the General Assembly must intend for this Commission to make a narrow determination of whether the complainant was discriminated against on the basis of race or gender. Otherwise, KRS §141.010, disallowing tax deductions in such circumstances, would have no effect as no agency would be authorized to make a factual determination of whether there was any discrimination in the first instance. A finding that this Commission has no authority to make the initial determination of discrimination would render the General Assembly's expressed intent to disallow a tax deduction completely useless and futile. Since we must presume that the General Assembly was well aware of its prior enactment of the Civil Rights Act, we can not find that it intended such a result.

Finally, we conclude that this Commission has been granted broad authority by the General Assembly of Kentucky under the functions, powers, and duties section set forth in Chapter 344, to make an initial determination of whether a tax deduction for private clubs should be allowed under KRS §141.010(11)(d) and 13(f). This Commission's purpose is to "safeguard all individuals within the state from discrimination because of race, gender, religion, national origin, sex, and age, KRS § 344.020(1)(b), and this Commission was established to discourage discrimination against any racial ethnic group or its members. KRS § 344.150, KRS §344.170. These broad powers and duties include conducting research projects and publishing reports on discrimination. KRS §344.180. Based on the foregoing, we conclude that KRS §344.130 does not prohibit the Commission from making the initial determination of whether a private club does discriminate in its membership and that maintaining the complaints herein for that limited purpose is the proper, and perhaps only vehicle to accomplish that limited purpose.[2] Moreover, an agency always has jurisdiction and determines the scope of their authority. Initially, discovery should be pursued in regard to whether the Respondents are indeed "private clubs" and entitled to any exception.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED AND ADJUDGED that Respondents' motion to dismiss is denied and this matter will proceed for the limited purpose of determining whether Respondents are "private clubs" and for the purpose of determining whether they discriminate in their membership selection practices.

Entered this 14th day of March, 1995.

Naomi L. Diaz, Vice Chair for
s/ Howard O. Mann
Chairperson
Kentucky Commission on
Human Rights

ENDNOTES

1. Although we doubt that private clubs have any constitutional right to discriminate in its membership on any arbitrary, criteria of race, gender, or other protected classification, the Revenue Code does not purport in any way to restrict private club's activities or impose conditions upon the free exercise or right of speech, association, or assembly. Other local and state ordinances which deny certain privileges to private clubs which discriminate, such as tax, deductions or liquor licenses, have been upheld against constitional challenges. See Sawyer, Private Golf Clubs: Freedom of Expression and the Right to Privacy, 3 Marq. Sports L.J. 187 (1993); Coalition for Open Doors v. Annapolis Lodge No. 622, Benevolent and Protective Order of Elks, 333 Md. 359, 635 A.2d 412 (Ct. App. Md. 1922) (City Ordinance Conditioning alcoholic beverage license upon nondiscriminating membership policy by club licensee did not conflict with state public accommodations law that excluded private clubs from its coverage; statuatory exclusion was not affirmative authorization to discriminate.)

2. Although no Kentucky court has confronted this issue, the Kentucky Attorney General issued its opinion in 1991, consistent with our opinion herein. OAG 91-197. Although not binding upon the commission, we find the Attorney General's opinion persuasive.

Certificate of Service

The undersigned hereby certifies that a copy of the attached corrected **CONCLUSIONS OF LAW AND ORDER** was served by hand delivery to Kathleen Jordan, Managing Attorney, Kentucky Commission on Human Rights, The Heyburn Building, 332 West Broadway Seventh Floor, Louisville, Kentucky 40202, and served by Certified Mail, postage prepaid on the following parties: Mr. James Smith, III Attorney at Law 400 North First Trust Center 200 S. Fifth Street, Louisville, Kentucky 40202-3238; and same was served on the Attorney General of the Commonwealth of Kentucky, by First Class Mail, postage prepaid, all done this 15th day of March, 1995.

/s/ Beverly L. Watts
Beverly L. Watts
Executive Directors
Kentucky Commission on
Human Rights
The Heyburn Building
332 West Broadway
Seventh Floor
Post Office Box 69
Louisville, KY 40201-0069

APPENDIX F

[Filed: June 7, 1999]

97-5758/5829

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LOUISVILLE COUNTRY CLUB, A KENTUCKY CORPORATION, ON BEHALF OF ITSELF AND ALL OF ITS MEMBERS, ET AL.,	)	
Plaintiffs-Appellees/ Cross Appellants,	)	
v.	)	ORDER
BEVERLY L. WATTS, IN HER CAPACITY AS EXECUTIVE DIRECTOR OF THE KENTUCKY COMMISSION ON HUMAN RIGHTS, ET AL.,	)	
Defendants-Appellants/ Cross Appellees.	)	

BEFORE: KEITH, MERRITT, and NORRIS, Circuit Judges

The court having received a petition for rehearing en blanc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en blanc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX G

CONSTITUTION OF THE UNITED STATES

AMENDMENT I – FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX H

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV – CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such

male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX I

28 U.S.C. § 1341

1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such State.

APPENDIX J

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX K

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 95-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A.

§2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §2000d et seq.], or section 13981 of this title[10], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

---

[10] So in original.

APPENDIX L

BALDWIN'S KENTUCKY REVISED STATUTES ANNOTATED TITLE XI REVENUE AND TAXATION CHAPTER 131. REVENUE CABINET

131.030 FUNCTIONS OF CABINET; SETTLEMENT OF TAX CASES

(1) The Revenue Cabinet shall exercise all administrative functions of the state in relation to the state revenue and tax laws, the licensing and registering of motor vehicles, the equalization of tax assessments, the assessment of public utilities and public service corporations for taxes, the assessment of franchises, the supervision of tax collections, and the enforcement of revenue and tax laws, either directly or through supervision of tax administration activity in other departments to which the Revenue Cabinet may commit administration of certain taxes.

(2) The Revenue Cabinet shall have all the powers and duties with reference to assessment or equalization of the assessment of property heretofore exercised or performed by any state board or commission.

(3) The Revenue Cabinet shall have all the powers and duties necessary to consider and settle tax cases under KRS 131.110 and refund claims made under KRS 134.580. The Revenue Cabinet is encouraged to settle controversies on a fair and equitable basis and shall be

authorized to settle tax controversies based on the hazards of litigation applicable to them.

APPENDIX M

BALDWIN'S KENTUCKY REVISED STATUTES ANNOTATED TITLE XI REVENUE AND TAXATION CHAPTER 131. REVENUE CABINET KENTUCKY TAXPAYERS' BILL OF RIGHTS

131.081 RULES APPLICABLE TO THE ADMINISTRATION OF ALL TAXES UNDER JURISDICTION OF REVENUE CABINET

The following rules, principles, or requirements shall apply in the administration of all taxes subject to the jurisdiction of the Revenue Cabinet.

(1) The cabinet shall develop and implement a Kentucky tax education and information program directed at new taxpayers, taxpayer and industry groups, and cabinet employees to enhance the understanding of and compliance with Kentucky tax laws, including the application of new tax legislation to taxpayer activities and areas of recurrent taxpayer noncompliance or inconsistency of administration.

(2) The cabinet shall publish brief statements in simple and nontechnical language which explain procedures, remedies, and the rights and obligations of taxpayers and the cabinet. Such statements shall be provided to taxpayers with the initial notice of audit; each original notice of tax due; each denial or reduction of a refund or credit claimed by a taxpayer; each denial, cancellation, or

revocation of any license, permit, or other required authorization applied for or held by a taxpayer; and, if practical and appropriate, in informational publications by the cabinet distributed to the public.

(3) Taxpayers shall have the right to be assisted or represented by an attorney, accountant, or other person in any conference, hearing, or other matter before the cabinet. The taxpayer shall be informed of such right prior to conduct of any conference or hearing.

(4) The cabinet shall perform audits and conduct conferences and hearings only at reasonable times and places.

(5) Taxpayers shall have the right to make audio recordings of any conference with or hearing by the cabinet. The cabinet may make similar audio recordings only if prior written notice is given to the taxpayer. The taxpayer shall be entitled to a copy of such cabinet recording or a transcript thereof as provided in KRS 61.874.

(6) If any taxpayer's failure to submit a timely return or payment to the cabinet is due to the taxpayer's reasonable reliance on written advice from the cabinet, the taxpayer shall be relieved of any penalty or interest with respect thereto provided the taxpayer requested such advice in writing from the cabinet and the specific facts and circumstances of the activity or transaction were fully described in the taxpayer's request, the cabinet did not subsequently rescind or modify the advice in writing and there were no subsequent changes in applicable laws or regulations or a final decision of a court which rendered the cabinet's earlier written advice no longer valid.

(7) Taxpayers shall have the right to receive a copy of any audit of the cabinet by the Auditor of Public Accounts relating to the cabinet's compliance with the provisions of KRS 131.041 to 131.081.

(8) The cabinet shall include with each notice of tax due a clear and concise description of the basis and amount of any tax, penalty, and interest assessed against the taxpayer, and copies of the agent's audit workpapers and the agent's written narrative setting forth the grounds upon which the assessment is made. Taxpayers shall be similarly notified regarding the denial or reduction of any refund or credit claim filed by a taxpayer.

(9) Taxpayers shall have the right to an installment payment agreement for the payment of delinquent taxes, penalties, and interest owed provided the taxpayer requests the agreement in writing clearly demonstrating his inability to pay in full and that the agreement will facilitate collection by the cabinet of the amounts owed. The cabinet may modify or terminate an installment payment agreement if it determines the taxpayer has not complied with the terms of the agreement; the taxpayers' financial condition has sufficiently changed; the taxpayer fails to provide any requested financial condition update information; the taxpayer gave false or misleading information in securing the agreement; or the taxpayer fails to timely report and pay any other tax due the Commonwealth. The cabinet shall give written notice to the taxpayer at least thirty (30) days prior to modifying or terminating an installment payment agreement unless the cabinet has reason to believe that collection of the amounts owed will be jeopardized in whole or in part by delay.

(10) The cabinet shall not knowingly authorize, require, or conduct any investigation or surveillance of any person for nontax administration related purposes, except internal security related investigations involving Revenue Cabinet personnel.

(11) In addition to the circumstances under which an extension of time for filing reports or returns may be granted pursuant to KRS 131.170, taxpayers shall be entitled to the same extension of the due date of any comparable Kentucky tax report or return for which the taxpayer has secured a written extension from the Internal Revenue Service provided the taxpayer notifies the cabinet thereof in writing and provides a copy of such extension at the time and in the manner which the cabinet may require.

(12) The cabinet shall bear the cost or, if paid by the taxpayer, reimburse the taxpayer for recording or bank charges as the direct result of any erroneous lien or levy by the cabinet, provided the erroneous lien or levy was caused by cabinet error and, prior to issuance of the erroneous lien or levy, the taxpayer timely responded to all contacts by the cabinet and provided information or documentation sufficient to establish his or her position. When the cabinet releases any such erroneous lien or levy, notice of the fact shall be mailed to the taxpayer and, if requested by the taxpayer, a copy of the release, together with an explanation thereof, shall be mailed to the major credit reporting companies located in the county where it was filed.

(13) The cabinet shall not evaluate individual officers or employees on the basis of taxes assessed or collected or impose or suggest tax assessment or collection quotas or

goals.

(14) Taxpayers shall have the right to bring an action for damages against the Commonwealth to the Board of Claims for actual and direct monetary damages sustained by the taxpayer as a result of willful, reckless, and intentional disregard by cabinet employees of the rights of taxpayers as set out in KRS 131.041 to 131.081 or in the tax laws administered by the cabinet. In the awarding of damages pursuant to this subsection, the board shall take into consideration the negligence or omissions, if any, on the part of the taxpayer which contributed to the damages. If any such proceeding brought by a taxpayer is ruled frivolous by the board, the cabinet shall be reimbursed by the taxpayer for its costs in defending the action.

(15) Taxpayers shall have the right to privacy with regard to the information provided on their Kentucky tax returns and reports, including any information or documents attached thereto. Except as provided by KRS 131.190, no information pertaining to such returns, reports, or the affairs of a person's business shall be divulged by the cabinet or the Finance and Administration Cabinet's Office of Financial Management and Economic Analysis to any person.

APPENDIX N

BALDWIN'S KENTUCKY REVISED STATUTES ANNOTATED TITLE XI REVENUE AND TAXATION CHAPTER 131. REVENUE CABINET GENERAL PROVISIONS

131.130 GENERAL POWERS AND DUTIES OF CABINET; PROSECUTION DUTIES

Without limitation of other duties assigned to it by law, the following powers and duties are vested in the revenue cabinet:

(1) The cabinet may make administrative regulations, and direct proceedings and actions, for the administration and enforcement of all tax laws of this state.

(2) The cabinet, by representatives appointed by it in writing, may take testimony or depositions, and may examine the records, documents, files and equipment of any taxpayer or of any person whose records, documents or equipment will furnish knowledge concerning the tax liability of any taxpayer, when it deems this reasonably necessary for purposes incident to the performance of its functions. The cabinet may enforce this right by application to the circuit court in the county wherein the person is domiciled or has his principal office, or by application to the Franklin Circuit Court, which courts may compel compliance with the orders of the cabinet.

(3) The cabinet shall prescribe the style, and determine and enforce the use or manner of keeping, of all assessment and tax forms and records employed by state and county officials, and may prescribe forms necessary for the administration of any revenue law.

(4) The cabinet shall advise on all questions respecting the construction of state revenue laws and the application thereof to various classes of taxpayers and property.

(5) Attorneys employed by the cabinet and approved by the attorney general as provided in KRS 15.020 may prosecute all violations of the criminal and penal laws relating to revenue and taxation. If a revenue cabinet attorney undertakes any of the actions prescribed in this subsection, he shall be authorized to exercise all powers and perform all duties in respect to the criminal actions or proceedings which the prosecuting attorney would otherwise perform or exercise, including, but not limited to, the authority to sign, file, and present any and all complaints, affidavits, information, presentments, accusations, indictments, subpoenas and processes of any kind, and to appear before all grand juries, courts, or tribunals.

(6) In the event of the incapacity of attorneys employed by the cabinet or at the request of the secretary of the revenue cabinet, the attorney general or his designee shall prosecute all violations of the criminal and penal laws relating to revenue and taxation. If the attorney general undertakes any of the actions prescribed in this subsection, he shall be authorized to exercise all powers and perform all duties in respect to the criminal actions or proceedings which the prosecuting attorney would otherwise perform or exercise, including, but not limited

to, the authority to sign, file, and present any and all complaints, affidavits, information, presentments, accusations, indictments, subpoenas and processes of any kind, and to appear before all grand juries, courts, or tribunals.

(7) The cabinet may require the Commonwealth's attorneys and county attorneys to prosecute actions and proceedings and perform other services incident to the enforcement of laws assigned to the cabinet for administration.

(8) The cabinet may conduct research in the fields of taxation, finance and local government administration, and publish its findings, as the secretary may deem wise.

(9) The cabinet may make administrative regulations necessary to establish a system of taxpayer identifying numbers for the purpose of securing proper identification of taxpayers subject to any tax laws or other revenue measure of this state, and may require such taxpayer to place on any return, report, statement or other document required to be filed, any number assigned pursuant to such administrative regulations.

APPENDIX O

BALDWIN'S KENTUCKY REVISED STATUTES ANNOTATED TITLE XI REVENUE AND TAXATION CHAPTER 131. REVENUE CABINET GENERAL PROVISIONS

131.190 INFORMATION ACQUIRED IN TAX ADMINISTRATION NOT TO BE DIVULGED; EXCEPTIONS

(1) No present or former secretary or employee of the Revenue Cabinet, or employee in the Finance and Administration Cabinet's Office of Financial Management and Economic Analysis, member of a county board of assessment appeals, property valuation administrator or employee thereof, or any other person, shall divulge any information acquired by him of the affairs of any person, or information regarding the tax schedules, returns or reports required to be filed with the cabinet or other proper officer, or any information produced by a hearing or investigation, insofar as the information may have to do with the affairs of the person's business. This prohibition does not extend to information required in prosecutions for making false reports or returns of property for taxation, or any other infraction of the tax laws, nor does it extend to any matter properly entered upon any assessment record, or in any way made a matter of public record, nor does it preclude furnishing any taxpayer or his properly

authorized agent with information respecting his own return. Further, this prohibition does not preclude the secretary or any employee of the Revenue Cabinet, or any employee of the Finance and Administration Cabinet's Office of Financial Management and Economic Analysis, from testifying in any court, or from introducing as evidence returns or reports filed with the cabinet, in an action for violation of state or federal tax laws or in any action challenging state or federal tax laws.

(2) The secretary shall make available any information for official use only and on a confidential basis to the proper officer, board or commission of this state, any Kentucky county, any Kentucky city, any other state, or the federal government, under reciprocal arrangements whereby the cabinet shall receive similar or useful information in return.

(3) Statistics of tax-paid gasoline gallonage reported monthly to the Revenue Cabinet by any licensee under the gasoline excise tax law may be made public by the cabinet.

(4) Notwithstanding the above, information received from the Internal Revenue Service shall not be made available to any other agency or office within any agency of state government that does not perform a tax administrative function, any county, any city, or any other state.

(5) Statistics of crude oil as reported to the Revenue Cabinet under the crude oil excise tax requirements of KRS Chapter 137 and statistics of natural gas production as reported to the Revenue Cabinet under the natural resources severance tax requirements of KRS Chapter

143A may be made public by the cabinet by release to the Department of Mines and Minerals.

APPENDIX P

BALDWIN'S KENTUCKY REVISED STATUTES ANNOTATED TITLE XI REVENUE AND TAXATION CHAPTER 135. COLLECTION OF PUBLIC CLAIMS BY ACTION

135.030 ISSUE OF PROCESS AND EXECUTIONS ON JUDGMENTS IN FAVOR OF THE STATE

(1) Each circuit court clerk shall, after the expiration of ten (10) days from the rendition of judgment in favor of the state, unless otherwise ordered by the court, issue proper process and place it in the hands of the sheriff on all such judgments that have not been paid or replevied in the office or remitted or respited by the governor, and each such clerk shall, within ten (10) days after the maturity of each replevied bond on any such judgment entered in the court of which he is clerk, issue executions and place them in the hands of the sheriff. Upon an execution so issued upon any replevied bond being returned by the sheriff without making the money, the officer who issued it shall reissue executions and place them in the hands of the sheriff from time to time at least once every ten (10) months for a period of five (5) years, and as often thereafter as demanded by the Commonwealth's attorney, county attorney, sheriff or circuit court clerk. Upon all such judgments, executions or capias pro fine that are stayed or respited by the governor, the clerk of the court in which the judgment has been entered shall issue

proper process and place it in the hands of the sheriff within ten (10) days after the expiration of the stay or respite. A receipt shall be taken from the sheriff for all process placed in his hands pursuant to this section.

(2) Upon the failure of any circuit court clerk to discharge his duties as required in this section, he shall be held responsible on his official bond for the amount of the judgment, interest and costs to which such failure is applicable.

(3) Nothing in this section shall authorize the governor to remit any judgment unless it is a fine imposed as a punishment.

APPENDIX Q

BALDWIN'S KENTUCKY REVISED STATUTES ANNOTATED TITLE XI REVENUE AND TAXATION CHAPTER 135. COLLECTION OF PUBLIC CLAIMS BY ACTION

135.050 ACTION BY REVENUE CABINET TO ASCERTAIN AND COLLECT TAXES; INJUNCTION; ATTACHMENT AND GARNISHMENT

(1) The secretary of revenue shall prosecute diligently the collection of all license fees, omitted license, inheritance, estate, income, excise or franchise taxes, judgments or other moneys, claims or demands due the state from any person.

(2) The revenue cabinet may institute legal proceedings to ascertain the amount of tax due under any statute imposing a license, excise or income tax in favor of the state, and to enforce the collection of the amount due and the penalties and interest thereon, and, in the case of a license or excise tax, to enjoin the operation of the business of the delinquent until the tax is paid.

(3) The revenue cabinet may, at or after the commencement of an action under subsection (2) of this section to collect the amount of license, excise or income tax due and the penalties and interest thereon, have an attachment against

the property of the person liable for the tax or a garnishment of his debtors, without the execution of a bond.

APPENDIX R

BALDWIN'S KENTUCKY REVISED STATUTES ANNOTATED TITLE XI REVENUE AND TAXATION CHAPTER 141. INCOME TAXES

141.010 DEFINITIONS FOR CHAPTER

As used in this chapter, unless the context requires otherwise:

(1) "Secretary" means the secretary of revenue;

(2) "Cabinet" means the Revenue Cabinet;

(3) "Internal Revenue Code" means the Internal Revenue Code in effect on December 31, 1993, exclusive of any amendments made subsequent to that date, other than amendments that extend provisions in effect on December 31, 1993, that would otherwise terminate, and as modified by KRS 141.0101;

(4) "Dependent" means those persons defined as dependents in the Internal Revenue Code;

(5) "Fiduciary" means "fiduciary" as defined in Section 7701(a)(6) of the Internal Revenue Code;

(6) "Fiscal year" means "fiscal year" as defined in Section 7701(a)(24) of the Internal Revenue Code;

(7) "Individual" means a natural person;

(8) For taxable years beginning on or after January 1, 1974, "federal income tax" means the amount of federal income tax actually paid or accrued for the taxable year on taxable income as defined in Section 63 of the Internal Revenue Code, and taxed under the provisions of this chapter, minus any federal tax credits actually utilized by the taxpayer;

(9) "Gross income" in the case of taxpayers other than corporations means "gross income" as defined in Section 61 of the Internal Revenue Code;

(10) "Adjusted gross income" in the case of taxpayers other than corporations means gross income as defined in subsection (9) of this section minus the deductions allowed individuals by Section 62 of the Internal Revenue Code and as modified by KRS 141.0101 and adjusted as follows, except that deductions shall be limited to amounts allocable to income subject to taxation under the provisions of this chapter, and except that nothing in this chapter shall be construed to permit the same item to be deducted more than once:

(a) Exclude income that is exempt from state taxation by the Kentucky Constitution and the Constitution and statutory laws of the United States and Kentucky;

(b) Exclude income from supplemental annuities provided by the Railroad Retirement Act of 1937 as amended and which are subject to federal income tax by Public Law 89-699;

(c) Include interest income derived from obligations of sister states and political subdivisions thereof;

(d) Exclude employee pension contributions picked up as provided for in KRS 6.505, 16.545, 21.360, 61.560, 65.155, 67A.320, 67A.510, 78.610, and 161.540 upon a ruling by the Internal Revenue Service or the federal courts that these contributions shall not be included as gross income until such time as the contributions are distributed or made available to the employee;

(e) Exclude Social Security and railroad retirement benefits subject to federal income tax;

(f) Include, for taxable years ending before January 1, 1991, all overpayments of federal income tax refunded or credited for taxable years;

(g) Deduct, for taxable years ending before January 1, 1991, federal income tax paid for taxable years ending before January 1, 1990;

(h) Exclude any money received because of a settlement or judgment in a lawsuit brought against a manufacturer or distributor of "Agent Orange" for damages resulting from exposure to Agent Orange by a member or veteran of the armed forces of the United States or any dependent of such person who served in Vietnam; and

(i) 1. Exclude the applicable amount of total distributions from pension plans, annuity contracts, profit-sharing plans, retirement plans, or employee savings plans.

2. The "applicable amount" shall be:

a. Twenty-five percent (25%), but not more than six thousand two hundred and fifty dollars ($6,250), for taxable years beginning after December 31, 1994, and before January 1, 1996;

b. Fifty percent (50%), but not more than twelve thousand five hundred dollars ($12,500), for taxable years beginning after December 31, 1995, and before January 1, 1997;

c. Seventy-five percent (75%), but not more than eighteen thousand seven hundred fifty dollars ($18,750), for taxable years beginning after December 31, 1996, and before January 1, 1998; and

d. One hundred percent (100%), but not more than thirty-five thousand dollars ($35,000), for taxable years beginning after December 31, 1997.

3. As used in this paragraph:

a. "Distributions" includes but is not limited to any lump-sum distribution from pension or profit-sharing plans qualifying for the

income tax averaging provisions of Section 402 of the Internal Revenue Code; any distribution from an individual retirement account as defined in Section 408 of the Internal Revenue Code; and any disability pension distribution that is taxed as pension and annuity income for federal income tax purposes;

b. "Annuity contract" has the same meaning as set forth in Section 1035 of the Internal Revenue Code; and

c. "Pension plans, profit-sharing plans, retirement plans, or employee savings plans" means any trust or other entity created or organized under a written retirement plan and forming part of a stock bonus, pension, or profit-sharing plan of a public or private employer for the exclusive benefit of employees or their beneficiaries and includes plans qualified or unqualified under Section 401 of the Internal Revenue Code and individual retirement accounts as defined in Section 408 of the Internal Revenue Code.

(11) "Net income" in the case of taxpayers other than corporations means adjusted gross income as defined in subsection (10) of this section, minus the standard deduction allowed by KRS 141.081, or, at the option of the taxpayer, minus the deduction allowed by KRS 141.0202 and minus all the deductions allowed individuals by Chapter 1 of the Internal Revenue Code as modified by KRS 141.0101 except those listed below, except that deductions shall be limited to amounts

allocable to income subject to taxation under the provisions of this chapter and that nothing in this chapter shall be construed to permit the same item to be deducted more than once:

(a) Any deduction allowed by the Internal Revenue Code for state taxes measured by gross or net income, except that such taxes paid to foreign countries may be deducted;

(b) Any deduction allowed by the Internal Revenue Code for amounts allowable under KRS 140.090(1)(h) in calculating the value of the distributive shares of the estate of a decedent, unless there is filed with the income return a statement that such deduction has not been claimed under KRS 140.090(1)(h);

(c) The deduction for personal exemptions allowed under Section 151 of the Internal Revenue Code and any other deductions in lieu thereof; and

(d) Any deduction for amounts paid to any club, organization, or establishment which has been determined by the courts or an agency established by the General Assembly and charged with enforcing the civil rights laws of the Commonwealth, not to afford full and equal membership and full and equal enjoyment of its goods, services, facilities, privileges, advantages, or accommodations to any person because of race, color, religion, national origin, or sex, except

nothing shall be construed to deny a deduction for amounts paid to any religious or denominational club, group, or establishment or any organization operated solely for charitable or educational purposes which restricts membership to persons of the same religion or denomination in order to promote the religious principles for which it is established and maintained;

(12) "Gross income," in the case of corporations, means "gross income" as defined in Section 61 of the Internal Revenue Code and as modified by KRS 141.0101 and adjusted as follows:

(a) Exclude income that is exempt from state taxation by the Kentucky Constitution and the Constitution and statutory laws of the United States;

(b) Exclude all dividend income received after December 31, 1969;

(c) Include interest income derived from obligations of sister states and political subdivisions thereof;

(d) Exclude fifty percent (50%) of gross income derived from any disposal of coal covered by Section 631(c) of the Internal Revenue Code if the corporation does not claim any deduction for percentage depletion, or for expenditures attributable to the making and administering of the contract under which such disposition occurs or to the

preservation of the economic interests retained under such contract;

(e) Include in the gross income of lessors income tax payments made by lessees to lessors, under the provisions of Section 110 of the Internal Revenue Code, and exclude such payments from the gross income of lessees;

(f) Include th amount calculated under KRS 141.205;

(g) Ignore the provisions of Section 281 of the Internal Revenue Code in computing gross income; and

(h) Exclude income from "safe harbor leases" (Section 168(f)(8) of the Internal Revenue Code);

(13) "Net income," in the case of corporations, means "gross income" as defined in subsection (12) of this section minus the deduction allowed by KRS 141.0202 and minus all the deductions from gross income allowed corporations by Chapter 1 of the Internal Revenue Code and as modified by KRS 141.0101, except the following:

(a) Any deduction for a state tax which is computed, in whole or in part, by reference to gross or net income and which is paid or accrued to any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or to any foreign country

or political subdivision thereof;

(b) The deductions contained in Sections 243, 244, 245, and 247 of the Internal Revenue Code;

(c) The provisions of Section 281 of the Internal Revenue Code shall be ignored in computing net income;

(d) Any deduction directly or indirectly allocable to income which is either exempt from taxation or otherwise not taxed under the provisions of this chapter, and nothing in this chapter shall be construed to permit the same item to be deducted more than once;

(e) Exclude expenses related to "safe harbor leases" (Section 168(f)(8) of the Internal Revenue Code); and

(f) Any deduction for amounts paid to any club, organization, or establishment which has been determined by the courts or an agency established by the General Assembly and charged with enforcing the civil rights laws of the Commonwealth, not to afford full and equal membership and full and equal enjoyment of its goods, services, facilities, privileges, advantages, or accommodations to any person because of race, color, religion, national origin, or sex, except nothing shall be construed to deny a deduction for amounts paid to any religious or denominational club, group, or

establishment or any organization operated solely for charitable or educational purposes which restricts membership to persons of the same religion or denomination in order to promote the religious principles for which it is established and maintained;

(14) (a) "Taxable net income," in the case of corporations having property or payroll only in this state, means "net income" as defined in subsection (13) of this section;

(b) "Taxable net income," in the case of corporations having property or payroll both within and without this state means "net income" as defined in subsection (13) of this section and as allocated and apportioned under KRS 141.120;

(c) "Property" means either real property or tangible personal property which is either owned or leased. "Payroll" means compensation paid to one (1) or more individuals, as described in KRS 141.120(8)(b). Property and payroll are deemed to be entirely within this state if all other states are prohibited by Public Law 86-272, as it existed on December 31, 1975, from enforcing income tax jurisdiction; and

(d) "Taxable net income" in the case of homeowners' associations as defined in Section 528(c) of the Internal Revenue Code, means "taxable income" as defined in Section 528(d) of the Internal Revenue

Code. Notwithstanding the provisions of subsection (3) of this section, the Internal Revenue Code sections referred to in this paragraph shall be those code sections in effect for the applicable tax year;

(15) "Person" means "person" as defined in Section 7701(a)(1) of the Internal Revenue Code;

(16) "Taxable year" means the calendar year or fiscal year ending during such calendar year, upon the basis of which net income is computed, and in the case of a return made for a fractional part of a year under the provisions of this chapter or under regulations prescribed by the secretary, "taxable year" means the period for which such return is made;

(17) "Resident" means an individual domiciled within this state or an individual who is not domiciled in this state, but maintains a place of abode in this state and spends in the aggregate more than one hundred eighty-three (183) days of the taxable year in this state;

(18) "Nonresident" means any individual not a resident of this state;

(19) "Employer" means "employer" as defined in Section 3401(d) of the Internal Revenue Code;

(20) "Employee" means "employee" as defined in Section 3401(c) of the Internal Revenue Code;

(21) "Number of withholding exemptions claimed" means the number of withholding exemptions claimed in a withholding exemption certificate in effect under KRS

141.325, except that if no such certificate is in effect, the number of withholding exemptions claimed shall be considered to be zero;

(22) "Wages" means "wages" as defined in Section 3401(a) of the Internal Revenue Code and includes other income subject to withholding as provided in Section 3401(f) and Section 3402(k), (o), (p), (q), and (s) of the Internal Revenue Code;

(23) "Payroll period" means "payroll period" as defined in Section 3401(b) of the Internal Revenue Code;

(24) "Corporations" means "corporations" as defined in Section 7701(a)(3) of the Internal Revenue Code;

(25) "S corporations" means "S corporations" as defined in Section 1361(a) of the Internal Revenue Code. Stockholders of a corporation qualifying as an "S corporation" under this chapter may elect to treat such qualification as an initial qualification under Subchapter S of the Internal Revenue Code Sections.

APPENDIX S

BALDWIN'S KENTUCKY REVISED STATUTES ANNOTATED
TITLE XXVII LABOR AND HUMAN RIGHTS
CHAPTER 344. CIVIL RIGHTS

344.120 REFUSAL TO RENT OR SELL PUBLIC ACCOMMODATIONS UNLAWFUL

Except as otherwise provided in KRS 344.140 and 344.145, it is an unlawful practice for a person to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation, resort, or amusement, as defined in KRS 344.130, on the ground of disability, race, color, religion, or national origin.

APPENDIX T

BALDWIN'S KENTUCKY REVISED STATUTES ANNOTATED TITLE XXVII LABOR AND HUMAN RIGHTS CHAPTER 344. CIVIL RIGHTS

344.130. "PLACE OF PUBLIC ACCOMMODATION, RESORT, OR AMUSEMENT" DEFINED

As used in this chapter unless the context requires otherwise:

"Place of public accommodation, resort, or amusement" includes any place, store, or other establishment, either licensed or unlicenced, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds: except that

(1) A private club is not a place of public accommodation, resort, or amusement if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests; and

(2) "Place of public accommodation, resort, or amusement" does not include a rooming or boarding house containing not more than one (1) room for rent or hire and which is within a building occupied by the proprietor as his residence.

APPENDIX U

BALDWIN'S KENTUCKY REVISED STATUTES ANNOTATED TITLE XXVII LABOR AND HUMAN RIGHTS CHAPTER 344. CIVIL RIGHTS

344.200. COMPLAINTS OF DISCRIMINATION; PROCEDURE; CONCILIATION AGREEMENTS; ENFORCEMENT

(1) An individual claiming to be aggrieved by an unlawful practice other than a discriminatory housing practice, a member of the commission, or the Attorney General may file with the commission a written sworn complaint stating that an unlawful practice has been committed, setting forth the facts upon which the complaint is based, and setting forth facts sufficient to enable the commission to identify the persons charged (hereinafter the respondent). The commission staff or a person designated pursuant to its rules shall promptly investigate the allegations of unlawful practice set forth in the complaint and shall within five (5) days furnish the respondent with a copy of the complaint. The complaint must be filed within one hundred eighty (180) days after the alleged unlawful practice occurs.

(2) The commission or an individual designated pursuant to its rules shall determine within thirty (30) days after the complaint has been filed whether there is probable

cause to believe the respondent has engaged in an unlawful practice. If it is determined that there is no probable cause to believe that the respondent has engaged in an unlawful practice, the commission shall issue an order dismissing the complaint and shall furnish a copy of the order to the complainant, the respondent, the Attorney General, and such other public officers and persons as the commission deems proper.

(3) The complainant, within ten (10) days after receiving a copy of the order dismissing the complaint, may file with the commission an application for reconsideration of the order. Upon such application, the commission or an individual designated pursuant to its rules shall make a new determination within ten (10) days whether there is probable cause to believe that the respondent has engaged in an unlawful practice. If it is determined that there is no probable cause to believe that the respondent has engaged in an unlawful practice, the commission shall issue an order dismissing the complaint and furnishing a copy of the order to the complainant, the respondent, the Attorney General, and other public officers and persons as the commission deems proper.

(4) If the staff determines, after investigation, or if the commission determines after the review provided for in subsection (3) of this section that there is probable cause to believe that the respondent has engaged in an unlawful practice, the commission staff shall endeavor to eliminate the alleged unlawful practice by conference, conciliation and persuasion. The terms of a conciliation agreement reached with a respondent may require him to refrain from the commission of

unlawful discriminatory practices in the future and make such further provisions as may be agreed upon between the commission or its staff and the respondent. If a conciliation agreement is entered into, the commission shall issue and serve on the complainant an order stating its terms. A copy of the order shall be delivered to the respondent, the Attorney General, and such other public officers and persons as the commission deems proper. Except for the terms of the conciliation agreement, neither the commission nor any officer or employee thereof shall make public, without the written consent of the complainant and the respondent, information concerning efforts in a particular case to eliminate an unlawful practice by conference, conciliation, or persuasion whether or not there is a determination of probable cause or a conciliation agreement.

(5) At the expiration of one (1) year from the date of a conciliation agreement, and at other times in its reasonable discretion, the commission staff may investigate whether the terms of the agreement have been and are being complied with by the respondent. Upon a finding that the terms of the agreement are not being complied with by the respondent, the commission shall take whatever action it deems appropriate to assure compliance.

(6) At any time after a complaint is filed, the commission may file an action in the Circuit Court in a county in which the subject of the complaint occurs, or in a county in which a respondent resides or has his principal place of business, seeking appropriate temporary relief against the respondent, pending final determination of proceedings including an order or

decree restraining him from doing or procuring any act tending to render ineffectual any order the commission may enter with respect to the complaint. The court shall have power to grant temporary relief or a restraining order as it deems just and proper.

(7) Insofar as they are not inconsistent or in conflict with the procedure and practice provided by this chapter, the Kentucky Rules of Civil Procedure will apply to proceedings under this chapter.

(8) Nothing in this section shall apply to any discriminatory housing practice.

APPENDIX V

BALDWIN'S KENTUCKY REVISED STATUTES ANNOTATED
TITLE XXVII LABOR AND HUMAN RIGHTS
CHAPTER 344. CIVIL RIGHTS

344.240. SCOPE OF AND PROCEDURE FOR JUDICIAL REVIEW; DECREE; APPEAL

(1) Any complainant, respondent, or intervenor aggrieved by an order of the commission, including an order dismissing any complaint or stating the terms of a conciliation agreement, may obtain judicial review, and the commission may obtain an order of the court for enforcement of its order, in a proceeding brought in the Circuit Court in a county in which the alleged unlawful practice which is the subject of the order or complaint occurs or in which a respondent resides or has his principal place of business.

(2) The proceeding for review or enforcement is initiated by filing a complaint in the court. Copies of the complaint shall be served upon all parties of record. Within thirty (30) days after the service of the complaint upon the commission or its filing by the commission, or within such further time as the court may allow, the commission shall transmit to the court the original or a certified copy of the entire record upon which the order is based, including a transcript of testimony, which need not be printed. By stipulation of all parties to the review proceeding, the

record may be shortened. The findings of fact of the commission shall be conclusive unless clearly erroneous in view of the probative and substantial evidence on the whole record. The court shall have power to grant such temporary relief or restraining order as it deems just, and to enter an order enforcing, modifying and enforcing as modified, or setting aside in whole or in part the order of the commission, or remanding the case to the commission for further proceedings.

(3) Except for a discriminatory housing practice, if the commission has failed to schedule a hearing in accordance with KRS 344.210(1) or has failed to issue an order within one hundred eighty (180) days after the complaint is filed, the complainant, respondent, Attorney General, or an intervenor may petition the Circuit Court in a county in which the alleged unlawful practice set forth in the complaint occurs or in which the petitioner resides or has his principal place of business for an order directing the commission to take such action. The court shall follow the procedure set forth in subsection (2) so far as applicable.

(4) The court shall not consider any matter not considered by, nor any objection not raised before, the commission, unless the failure of a party to present such matter to or raise such objection before the commission is excused because of good cause shown. A party may move the court to remand the case to the commission in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, provided he

shows good cause for the failure to adduce such evidence before the commission.

(5) The jurisdiction of the Circuit Court shall be exclusive and its final judgment or decree shall be subject to review by the Court of Appeals as provided by the Rules of Civil Procedure. The commission's copy of the testimony shall be available to all parties for examination without cost during business hours at the commission's office in Frankfort.

(6) A proceeding under this section must be initiated within thirty (30) days after a copy of the order of the commission is received, unless the commission is the petitioner or the petition is filed under subsection (3). If no proceeding is so initiated, the commission may obtain a decree of the court for enforcement of its order upon showing that a copy of the petition for enforcement was served on the respondent.

(7) If before the expiration of sixty (60) days after the date of the commission order is entered for a discriminatory housing practice and no petition for review has been filed under subsection (1) of this section, any person entitled to under the discriminatory housing practice order may petition for a decree enforcing the order in the Circuit Court for the county in which the discriminatory housing practice is alleged to have occurred.

(8) Except for subsection (3) of this section, all provisions in this section shall apply to orders issued in a discriminatory housing practice proceeding.

APPENDIX W

BALDWIN'S KENTUCKY REVISED STATUTES ANNOTATED
TITLE XXVII LABOR AND HUMAN RIGHTS
CHAPTER 344. CIVIL RIGHTS

344.270. COMMISSION OR COURT NOT TO TAKE JURISDICTION OVER CLAIM FOR UNLAWFUL PRACTICE WHILE CLAIM PENDING BEFORE THE OTHER BODY; FINAL DETERMINATION EXCLUSIVE

The commission shall not take jurisdiction over any claim of an unlawful practice under this chapter while a claim of the same person seeking relief for the same grievance under KRS 344.450 is pending. A state court shall not take jurisdiction over any claim of an unlawful practice under this chapter while a claim of the same person seeking relief for the same grievance is pending before the commission. A final determination by a state court or the commission of a claim alleging an unlawful practice under KRS 344.450 shall exclude any other action or proceeding brought by the same person based on the same grievance.

APPENDIX X

[KENTUCKY COMMISSION ON HUMAN RIGHTS LETTERHEAD]

October 15, 1993

Louisville Country Club
PO Box 6028
Louisville, Kentucky 40206

RE: Cleveland v. Louisville Country Club
KCHR Complaint No. 256-PA

Dear Sir:

In accordance with the KRS 344.200(1), the Kentucky Commission on Human Rights is hereby serving you with a copy of the enclosed complaint which has been filed with this agency by Commissioner Mae Cleveland. Also enclosed is a copy of the Kentucky Civil Rights Act, and a copy of our regulations.

The Commission is the state agency charged with handling claims of discrimination in public accommodations made unlawful by the Kentucky Civil Rights Act, KRS 344.130. When a complaint is filed with the Commission, the Commission staff is required by law to conduct a prompt, thorough and impartial investigation of the allegations of the complaint to determine if, in fact, an unlawful practice has

occurred. No determination is made until the investigation is complete and the evidence has been evaluated by the staff.

The above complaint has been assigned to the undersigned for investigation. Any questions regarding the law or procedures involved should be addressed to me.

I am herein detailing a partial list of information and items we will need in order to continue our investigation in the above-styled complaint. At this time, the information which can specify and do request is listed below. A more comprehensive information request may follow after examination of the initial information.

1. Complete names and addresses of the officers of the Louisville Country Club.

2. A listing of current members of the Louisville Country Club by:

   a. race
   b. sex
   c. membership date

3. A copy of club by-laws.

4. Copies of all club rules and regulations.

5. Name of current club manager, sex and race.

Louisville Country Club
October 15, 1993

6. Names and addresses of club managers since January 1989.

7. A listing of all members who have terminated membership by name, race and sex since January 1989.

8. A listing of all persons currently on a waiting list for membership by name, race and sex.

9. A listing of all persons by name, race and sex who have been denied membership since January 1989.

Due to the requirements of KRS 344.200, this complaint will be set for hearing within sixty days of the file date unless it is resolved prior to that time. It is my request that the above data be provided no later than November 15, 1993.

Your cooperation in this investigation will be appreciated and you can expect ours in return. If you have any questions, please do not hesitate to call us.

Very truly yours,

/s/
Ed Weatherby
Compliance Officer

EW:pjr
Enclosures
CERTIFIED MAIL P130 027 513
RETURN RECEIPT REQUESTED

APPENDIX Y

[Filed: March 31, 1995]

COMMONWEALTH OF KENTUCKY
COMMISSION ON HUMAN RIGHTS
KCHR COMPLAINT NO. 256-PA, 257-PA, 258-PA

KENTUCKY COMMISSION
ON HUMAN RIGHTS ON
BEHALF OF COMMISSIONER
MAE CLEVELAND — PETITIONER

VS.

FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS PROPOUNDED TO RESPONDENTS

LOUISVILLE COUNTRY CLUB;
THE PENDENNIS CLUB; AND
IDLE HOUR COUNTRY CLUB — RESPONDENT

*** *** *** *** *** ***

Pursuant to the Kentucky Rules of Civil Procedure, and Pursuant to Order of the Commission, The Petitioner requests Respondents to produce the following documents specified below for inspection and copying. The documents are to be produced at the Kentucky Commission on Human Rights, the Heyburn Bldg., 7th floor, 332 West Broadway, Louisville, KY

40202, on or before 5 May 1995 at 10:00 a.m. In lieu thereof, the Respondents may satisfy this request by mailing copies of all documents requested to Petitioner's attorneys within the time frame for responding to this request.

As used herein, the term "document" shall be construed as any medium upon which information or intelligence is recorded and shall include, without limitation, any original writing, handwritten, typed or otherwise produced, and any identical copy and any nonidentical copy, whether different from the original because of notes made upon such copy or otherwise, in the possession, custody or control of the Respondents, regardless of where located. "Documents" shall include, but are not limited to, contracts, agreements, leases, papers, photographs, tape recordings, transcripts, notes (whether typewritten, handwritten or otherwise, checks, checkbooks, checkstubs, checkstatements, bank statements, deposit slips, journals, general and subsidiary ledgers, other types of ledgers, letters or other forms of correspondence, memoranda, desk calendars, notebooks, diaries, registers, appointment books, minutes or memoranda of meetings or conference of any kind, tax returns, computer data, and all writings regardless of form from which Petitioner can gain information. In all cases where originals and nonidentical copies are not available, "documents" shall also refer to copies of originals, identical copies and nonidentical copies.
Please produce the following:

1) Any and all MEMBERSHIP LISTS WITH NAME AND DATES DESIGNATED THEREON.

Sincerely,

/s/

Kathleen Jordan
B. James
Attorney for Petitioner
Kentucky Commission on
Human Rights
The Heyburn Bldg., 7th Floor
332 West Broadway
Louisville, KY 40202
(502) 595-4024

CERTIFICATION

I hereby certify that a true and accurate copy of the foregoing First Request for Production of Documents and Things Propounded to the Respondents was this 31st day of March 1995, mailed, 1st class postage pre-paid, certified, to Richard Griffith, Attorney at Law Suite 2300 Lexington Financial Center Lexington, KY 40507; Patton Pelfrey, Attorney at Law Suite 3200 Providian Center Louisville, KY 40202-3363, James Smith, III Attorney at Law, 400 North First Trust Center 200 South Fifth Street – Louisville, KY. 40202-3238.

/s/

B. James
Atty for Petitioner

Supreme Court, U.S.
FILED
NOV 8 1999
CLERK

99-412

In The

Supreme Court of the United States

LOUISVILLE COUNTRY CLUB; IDLE HOUR COUNTRY CLUB; PENDENNIS CLUB, INC.,

Petitioners,

v.

BEVERLY L. WATTS; PRISCILLA JOHNSON; ROBERT B. BOWLING; THURMOND COLEMAN, SR.; LOUISE M. COOPER; SUE G. DOWDY; HENRY L. JACKSON; JENNIFER JOLLY-RYAN; KAREN V. MCCORD; JOSEPH MCMILLAN; SUSAN D. PHILLIPS; and MARY ANN STEWART,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MORGAN G. RANSDELL
Counsel of Record for Respondents
Kentucky Commission on Human Rights
332 West Broadway, 7th Floor
Louisville, KY 40202
(502) 595-4024

Of Counsel:
D. BRENT IRVIN
Office of Attorney General
Albert B. Chandler, III
700 Capitol Avenue,
Room 118
Frankfort, KY 40601-3449
(502) 696-5300

LESLIE A. JONES
Kentucky Commission on Human Rights
332 W. Broadway,
7th Floor
Louisville, KY 40202
(502) 595-4024

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. STATEMENT OF THE FACTS 1

II. STATEMENT OF THE CASE 4

III. REASONS FOR DENYING THE WRIT 11

A. State Quasi-Judicial Proceedings Are Ongoing 12

B. The State Proceedings Implicate Important State Interests 14

C. There Is An Adequate Opportunity to Raise Constitutional Challenges in the State Proceedings 16

CONCLUSION 20

APPENDIX A
Attorney General's Opinion (OAG 91-197) and Opinion Request, 10/9/91 ..... 1a

APPENDIX B
Notice of Withdrawal of Pending Discovery Demands and Complainant's Interrogatories Seeking Statistical Information Regarding Club Membership, 8/20/99 ..... 11a

APPENDIX C
Report of Parties Planning Meeting, 5/31/96 ..... 14a

APPENDIX D
Respondents' Objection to and Motion for Enlargement of Time to Respond Further to "Notice of Withdrawal of Pending Discovery Demands and Complainant's Interrogatories Seeing Statistical Information Regarding Club Membership, 10/5/99 ..... 19a

TABLE OF AUTHORITIES

Page

CASES

Allen v. McCurry, 449 U.S. 90 (1980) 13

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 6

Barrett v. Reynolds, 817 S.W.2d 439 (Ky. 1991) 17

Buckley v. Valeo, 424 U.S. 1 (1976) 14, 15

Burris v. City of Little Rock, 941 F.2d 717 (8th Cir. 1991) 18

Dolan v. Land, 667 S.W.2d 684 (Ky. 1984) 17

Folio v. City of Clarksburg, 134 F.3d 1211 (4th Cir. 1998) 18

Franklin v. Natural Resources and Environmental Protection Cabinet, Com. of Ky., 799 S.W.2d 1 (Ky. 1990) 18

Harrison's Sanitarium, Inc. v. Com., Dept. of Health, 417 S.W. 137 (Ky. 1967) 18

Harrodsburg v. Southern Ry., 128 S.W.2d 233 (Ky. 1939) 17

In re Gillis, 836 F.2d 1001 (6th Cir. 1988) 17

International Soc'y for Krishna Consciousness v. Commonwealth, 610 S.W.2d 910 (Ky. App. 1980) 17

Long Island Lighting Co. v. Town of Brookhaven, 889 F.2d 428 (2nd Cir. 1989) 18

Louisiana Debating and Literary Association v. City of New Orleans, 42 F.3d 1483 (5th Cir. 1995) 7, 8, 10

Middlesex County Ethics Commission v. Garden State Bar Assoc., 457 U.S. 423 (1982) .. 11, 12, 13, 14, 15, 19

TABLE OF AUTHORITIES – Continued

Page

Moore v. Sims, 442 U.S. 415 (1979).....11, 18, 19

Newman v. Newman, 451 S.W.2d 417 (Ky. 1970) 13

Pacific-Union Club v. Superior Court, 232 Cal.App.3d 60, 283 Cal.Rptr. 287 (Cal.App. 1 Dist. 1991) 2, 7, 8, 9

Porter & Dietsch, Inc. v. FTC, 605 F.2d 294 (7th Cir. 1979)..... 13

Railroad Commission v. Pullman Co., 312 U.S. 496 (1941).....5, 6

Revenue Cabinet, Com. of Ky. v. Samani, 757 S.W.2d 199 (Ky. App. 1988) 13

Roberts v. United States Jaycees, 468 U.S. 609 (1984) ...8, 9

Rosary Catholic Parish of Paducah v. Whitfield, 729 S.W.2d 27 (Ky. App. 1987).....17, 18

Rotary Club v. Duarte, 481 U.S. 537 (1987) 14, 15

Southeastern United Medigroup, Inc. v. Hughes, 952 S.W.2d 195 (Ky. 1997)..... 17

St. Ledger v. Commonwealth, 912 S.W.2d 34 (Ky. 1995)..... 16

Trainor v. Hernandez, 431 U.S. 434 (1977) 16

Ward v. Southern Bell Tel. & Tel. Co., 436 S.W.2d 794 (Ky. 1968)..... 13

Western Oil & Gas v. U.S. E.P.A., 633 F.2d 803 (9th Cir. 1980) 13

Yeoman v. Com., Health Policy Bd., 983 S.W.2d 459 (Ky. 1998)..... 13

TABLE OF AUTHORITIES – Continued

Page

STATUTES

26 U.S.C. § 274 1

28 U.S.C. § 1341 10

42 U.S.C. § 1983 4

42 U.S.C. § 1988 5

Cal. Rev. & Tax. Code § 17269 (West 1997) 2

Cal. Rev. & Tax. Code § 24343.2 (West 1997) 2

Colo. Rev. Stat. § 39-22-104(1)(e)(I) (1997) 2

Colo. Rev. Stat. § 39-22-304(e)(I) (1997) 2

KRS § 13B.020 17

KRS § 13B.140 17

KRS § 13B.150(2)(a) 17

KRS §§ 141.010(11) & (13) ..... *passim*

KRS § 344.130(1) 3, 8, 12

KRS § 418.040 16

OTHER AUTHORITIES

Attorney General's Opinion (OAG 91-197) 3

Fed. R. Civ. P. 26(f) 6

Kentucky Rule of Civil Procedure 76.37 ..... 5, 7

Parker, *Membership Has Its Privileges*, 8 Cal. Law (June 1988) 14

Restatement (Second) of Judgments § 28(2)(b), (3), and (5)(a) 13

I. STATEMENT OF THE FACTS

This dispute between the Petitioners (hereinafter referred to as "the clubs") and the Respondents (hereinafter referred to collectively as "the Commission") arises entirely from controversial statutory enactments of the Kentucky state legislature: KRS §§ 141.010(11)(d) and (13)(f). Petitioners' Appendix R. These two sections of the Kentucky Revenue Code were enacted in their current form during the 1990 session of the Kentucky General Assembly. Put simply, these revenue code sections prohibit taxpayers from deducting any amounts paid to private clubs which have been found to discriminate on the basis of race, color, religion, national origin, or sex.[1]

Because these revenue code provisions are the genesis for the entire controversy between the clubs and the Commission, they should be scrutinized at the outset of this discussion. As addressed in greater detail below, the Commonwealth of Kentucky has a compelling state interest in eliminating invidious forms discrimination by private clubs. But the General Assembly of Kentucky has not directly prohibited private club discrimination. Instead, the General Assembly merely acted to abolish a state

---

[1] The clubs have previously asserted that changes in tax laws rendered these revenue code provisions moot. While deductions for club dues are no longer allowed under Kentucky's tax code, a variety of other payments to clubs remain deductible, thus preserving a live controversy in this case. 26 U.S.C. § 274(2)(k) (deductions for meals); 26 U.S.C. § 274(a) (deductions for entertainment, amusement, or recreation); 26 U.S.C. § 274(a)(2)(C) (deductions for use of club facilities). The foregoing federal statutes are applied in Kentucky by KRS §§ 141.010(11) & (13).

benefit, a tax deduction, which had the effect of subsidizing and perpetuating invidious discrimination.

Like California and Colorado, the Commonwealth of Kentucky amended its revenue code to abolish any indirect state tax subsidies that benefit discriminatory clubs.[2] Pursuant to the challenged revenue code provisions, Kentucky taxpayers are now prohibited from taking "[a]ny deduction for amounts paid to any club, organization, or establishment which has been determined by the courts *or an agency established by the General Assembly and charged with enforcing the civil rights laws of the Commonwealth,* not to afford full and equal membership and full and equal enjoyment of its goods, services, facilities, privileges, advantages, or accommodations to any person because of race, color, religion, national origin, or sex." KRS §§ 141.010(11)(d) and (13)(f) (emphasis added). But this enactment necessarily relies upon a determination that a particular club has discriminatory practices. The statute clearly refers to the Kentucky Commission on Human Rights where it indicates that such a determination may be made by the agency charged with enforcing the civil rights laws of the Commonwealth. KRS Chapter 344.

---

[2] *See,* Cal. Rev. & Tax. Code § 17269 (West 1997) (denying personal income tax deduction); Cal. Rev. & Tax. Code § 24343.2 (West 1997) (denying corporate income tax deduction); Colo. Rev. Stat. § 39-22-104(1)(e)(I) (1997) (denying personal income tax deduction; Colo. Rev. Stat. § 39-22-304(e)(I) (1997) (denying corporate income tax deduction). *See also, Pacific-Union Club v. Superior Court,* 232 Cal.App.3d 60, 283 Cal.Rptr. 287, 293 (Cal.App. 1 Dist. 1991) (examining in detail California anti-discrimination provisions analogous to KRS §§ 141.010(11)(d) & (13)(f)).

Much of the dispute regarding the foregoing provision arises from the fact that the public accommodation provisions of the Kentucky Civil Rights Act do not vest the Commission with the authority to conduct an investigation of *bona fide* private clubs. KRS § 344.130(1) ("A private club is not a place of public accommodation, resort, or amusement if its policies are determined by its members and its facilities and services are available only to its members and their bona fide guests; . . . "). Based upon this longstanding limitation upon the scope of its jurisdiction, the Commission initially concluded that it lacked statutory authority to make the investigation and determination envisioned by the revenue code provisions. *Coleman v. Louisville Country Club, et al.*, RA 110, RA 248, RA 398.[3] But the Commission subsequently reversed its position on this issue, in view of an Attorney General Opinion discussed below.

On October 9, 1991, the legislative sponsor of the relevant Revenue Code amendments, State Representative Ann Northup, requested an opinion of the Kentucky Attorney General regarding the scope of the Commission's authority under the revenue code provisions. The request and the Attorney General's Opinion (OAG 91-197) are attached as Appendix A. The Attorney General applied well known canons of statutory construction and concluded that Revenue Code amendments vest the Commission with independent authority to investigate

---

[3] Citations to "RA" are to pages of the "record on appeal" (Joint Appendix) filed with the U.S. Court of Appeals for the Sixth Circuit on March 4, 1998.

private clubs for the limited purpose of preventing improper tax deductions.

Subsequent to the issuance of the Attorney General's Opinion, the Commission initiated a second administrative proceeding against each of the clubs and issued discovery requests relevant to the clubs' membership practices. *Cleveland v. Louisville Country Club, et al.*, Petitioners' Appendix X. The clubs responded with a motion to dismiss. They asserted that the Commission was bound by its prior determination that it lacked jurisdiction to proceed against the clubs. They also asserted that the revenue code amendments did not enlarge the Commission's jurisdiction to investigate clubs. RA 116, 252, 557.

Relying on the Attorney General's Opinion, and their own reading of the statutes at issue, the Commissioners denied the clubs' motion to dismiss. Petitioners' Appendix E. The Commission subsequently renewed its original discovery demands and sought membership information from the clubs. Petitioners' Appendix X and Y. Shortly thereafter, the clubs filed suit against the Commission in the United States District Court for the Eastern District of Kentucky.

II. STATEMENT OF THE CASE

The clubs' suit seeks redress for the alleged violation of their members' federal rights of free association under the First and Fourteenth Amendments to the Constitution of the United States. 42 U.S.C. § 1983. The clubs also argue that the Commission exceeded its statutory authority by investigating complaints against them. Based upon

the foregoing claims, the clubs seek declaratory and injunctive relief to block the Commission from continuing with its investigation and administrative proceeding. The clubs also seek an award of attorney fees under 42 U.S.C. § 1988. Notably, no plea for monetary damages has been made by the clubs.

After the federal suit was filed, the Commission agreed to forego further investigation and proceedings in the administrative action, but only until the District Court issued a final decision, and not during the pendency of appeal. On August 25, 1999, the District Court issued a final order dismissing the underlying proceeding without prejudice in accordance with the decision of the Sixth Circuit Court of Appeals. The Commission has now resumed its investigation.[4]

On August 21, 1995, the Commission filed a motion to dismiss the clubs' complaints as barred by the Tax Injunction Act, or to abstain under the *Pullman* abstention doctrine. *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 499-501 (1941). As an alternative to *Pullman* abstention, the Commission also moved the District Court to certify the novel statutory construction issue to the Supreme Court of Kentucky, as specifically authorized by Kentucky Civil Rule of Procedure 76.37. RA 612-622. The requests for *Pullman* abstention and certification were premised upon the contention that a resolution of the state statutory construction issue could avoid the more

---

[4] On August 30, 1999, the Commission withdrew its outstanding request for membership lists, and instead requested that the clubs provide statistical information regarding club membership. Appendix B.

complex constitutional claims raised by the clubs. *See, Arizonans for Official English v. Arizona*, 520 U.S. 43, 78-80 (1997); *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 499-501 (1941).

On February 6, 1996, the District Court declined to dismiss the complaint pursuant to the Tax Injunction Act, declined to abstain, and declined to certify the statutory construction issue to the Supreme Court of Kentucky. Petitioners' Appendix D. The District Court held: "[a] determination of whether the Commission has authority to investigate private clubs will not necessarily obviate the consideration of whether the actions taken by the defendants thus far are unconstitutional." Petitioners' Appendix D, p. 26a. Ironically, the District Court later contradicted this conclusion when it subsequently disposed of the case through an analysis of Kentucky statutes. Petitioners' Appendix C, pp. 13a-15a. The District Court found that the Tax Injunction Act precluded at least some of the clubs' claims, and it sustained the motion to dismiss the Commission itself, pursuant to the agency's Eleventh Amendment immunity from suit. Petitioners' Appendix D, pp. 18a-22a.

Subsequent to the denial of the motion to dismiss, the parties held a planning meeting as required by Fed. R. Civ. P. 26(f). AR 737-738. During the meeting, the parties agreed that resolution of the substantive constitutional claims would necessitate collateral litigation regarding the scope of relevant discovery. Report of Parties' Planning Meeting attached as Appendix C. For example, the Commission has long asserted that a resolution of the constitutional issues raised herein will require discovery as to the amount of business conducted by members and

nonmembers at the three clubs. *See, Pacific-Union Club v. Superior Court*, 232 Cal.App.3d 60, 283 Cal.Rptr. 287, 293 (Cal.App. 1 Dist. 1991) (discussing relevance of this factual issue to resolving First Amendment freedom of association claims in a case examining California anti-discrimination provisions analogous to KRS §§ 141.010(11)(d) & (13)(f)). *See also, Louisiana Debating and Literary Association v. City of New Orleans*, 42 F.3d 1483, 1494-1497 (5th Cir. 1995).

Because the clubs sought to avoid a discovery dispute, they proposed a stay of discovery and the filing of initial dispositive pleadings on the statutory construction issue. Statutory construction was exactly what the Commissioners had in mind when they sought certification of a question of law to the Kentucky Supreme Court pursuant to Ky. R. Civ. P. 76.37. RA 612. In the hope that a liberal construction of the revenue code provisions would strengthen the Commission's defense of the clubs' constitutional claims, and given the fact that the District Court had refused to defer this issue to the state courts, the Commission agreed to stay discovery pending a resolution of the narrow statutory construction question. *See*, Report of Parties' Planning Meeting at Appendix C. Through this mechanism, the parties agreed to postpone discovery and adjudication regarding the clubs' constitutional claims. The parties filed their joint motion to stay discovery on the same date as the report of the planning meeting. AR 668.

The Commission was surprised when the clubs filed a motion for summary judgment premised in part upon their constitutional claims. The Commission responded

by asserting that summary judgment on the constitutional claims would be premature, as no discovery had yet been taken regarding facts relevant to those claims.[5] AR 738-742.

The clubs appear to argue, because they are exempt from the Kentucky Civil Rights Act, they are automatically entitled to absolute protection from government inquiry under the relevant revenue code provisions.[6] But

---

[5] "Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984). *See also, Pacific-Union Club v. Superior Court*, 232 Cal.App.3d 60, 283 Cal.Rptr. 287, 293-298 (Cal.App. 1 Dist. 1991) (discussing facts relevant to resolving First Amendment freedom of association claims in a case involving tax provisions analogous to KRS §§ 141.010(11)(d) & (13)(f)); *Louisiana Debating and Literary Association v. City of New Orleans*, 42 F.3d 1483, 1494-1497 (5th Cir. 1995).

[6] Citing the Commission decision of March 15, 1995, the clubs contend that the Commission found them to be exempt from public accommodations laws pursuant to the statutory exemption. KRS § 344.130(1) ("A private club is not a place of public accommodation, resort, or amusement if its policies are determined by its members and its facilities and services are available only to its members and their *bona fide* guests.") But a thorough reading of this decision indicates that the Commission believed this to be an open question. The final sentence of the decision directs that: "Initially, discovery should be pursued in regard to whether the [clubs] are indeed "private clubs" and entitled to any exception." Petitioners' Appendix E, pp. 34a-35a. Discovery on this issue was cut short by the clubs' federal suit; however, if permitted, the Commission believes discovery will establish that at least one of the clubs has routinely and

in order to make a reasoned constitutional analysis regarding the privacy rights of club members, a court must first determine where the clubs rest in the "broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State." *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984). This determination must rest largely upon a number of factual findings which are not addressed in the record: "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Id.* In light of these factors, it is quite possible that the protection extended to each club is different, depending upon the relevant facts.[7]

---

repeatedly opened its doors to individuals who are neither members nor *bona fide* guests.

[7] In *Pacific-Union Club v. Superior Court*, 232 Cal.App.3d 60, 283 Cal.Rptr. 287, 297 (Cal.App. 1 Dist. 1991), the California Franchise Tax Board subpoenaed the Pacific-Union Club's membership list in order to ascertain whether the new tax codes restricted the use of business expense deductions by club members. The California court specifically considered the fact that the club did not include among their activities business development and community interaction. The court also considered the extent to which the club enforced rules intended to maintain privacy: "The doors do not open from the outside; members and guests must identify themselves and be admitted by security staff. No member may bring the same person as a guest more than four times a month." *Pacific-Union Club*, 283 Cal. Rptr. at 295. Also relevant is the fact that the Pacific-Union Club purported to be, and was found to be, a purely private social organization. This fact was crucial to the California court's analysis: "Club members are prohibited from conducting business on Club premises. Club members must certify that charges incurred for use of Club facilities, including meals, were not incurred in the furtherance of trade, business or

The deliberate absence of any discovery on these issues greatly undermines the clubs' reliance upon constitutional claims.

It is clear that any resolution of the clubs constitutional claims would be premature, and on May 13, 1997, the District Court granted the clubs' motion for summary judgment without addressing the constitutional claims. Petitioners' Appendix B and C. The District Court focused upon the statutory construction issue, and held the statutes at issue do not grant the Commission express or implied authority to investigate private clubs.

The Commission appealed, asserting that the District Court erred both in failing to abstain or certify, and in its construction of relevant Kentucky statutes. The Petitioners filed a cross-appeal, asserting that the District Court erred in its partial application of the Tax Injunction Act, 28 U.S.C. § 1341. The Sixth Circuit Court of Appeals found it unnecessary to address any of the issues raised by the parties on appeal, and instead concluded that the District Court should have abstained pursuant to the *Younger* abstention doctrine. The clubs now ask this Court to grant certiorari in order to consider whether *sua sponte*

---

a profession. . . . Since April 1, 1988, each monthly statement has included this instruction: 'DUES ARE NOT DEDUCTIBLE AS CHARITABLE CONTRIBUTIONS. DUES & OTHER EXPENDITURES ARE NOT DEDUCTIBLE AS ORDINARY & NECESSARY BUSINESS EXPENSES FOR FEDERAL & CALIFORNIA STATE INCOME TAX OR FRANCHISE TAX PURPOSES.' " *Id. See also, Louisiana Debating and Literary Association v. City of New Orleans*, 42 F.3d 1483, 1494-1497 (5th Cir. 1995).

application of the *Younger* abstention doctrine was proper.

III. REASONS FOR DENYING THE WRIT

The clubs have correctly identified the legal issues relevant to the application of the *Younger* abstention doctrine. *See, Middlesex County Ethics Commission v. Garden State Bar Assoc.*, 457 U.S. 423, 432 (1982) (Where vital state interests are involved, a federal court should abstain from interfering in an ongoing state administrative proceeding, "unless state law clearly bars the interposition of the constitutional claims."). But it should be noted that the *Younger* abstention doctrine is particularly applicable in this case, where the District Court's only role was to adjudicate a broad facial attack on a novel state statute. This is the type of federal interference warned against in *Moore v. Sims*, 442 U.S. 415, 429-430 (1979).

> State courts are the principal expositors of state law. Almost every constitutional challenge – and particularly one as far ranging as that involved in this case – offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests. When federal courts disrupt that process of mediation while interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals. The price exacted in terms of comity would only be outweighed if state courts were not competent to adjudicate federal constitutional claims – a postulate we have repeatedly and emphatically rejected.

Id. (citations omitted).

As in *Middlesex County Ethics Commission*, the question in this case is threefold: first, do the state administrative proceedings constitute an ongoing quasi-judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges. *Middlesex County Ethics Commission v. Garden State Bar Assoc.*, 457 U.S. 423, 432 (1982).

A. State Quasi-Judicial Proceedings Are Ongoing.

There can be no dispute that state administrative proceedings are ongoing. The dual purposes of the ongoing administrative proceeding are: (1) to ascertain whether the clubs "afford full and equal membership and full and equal enjoyment of its goods, services, facilities, privileges, advantages, or accommodations to any person because of race, color, religion, national origin, or sex" in accordance with the Commission interpretation of the 1990 revenue code amendments (KRS §§ 141.010(11)(d) and (13)(f)); and (2) to ascertain whether the clubs' "policies are determined by members and [the clubs'] facilities and services are available only to members and their *bona fide* guests" in accordance with KRS § 344.130(1), the private clubs exemption from Kentucky public accommodation laws. *See*, Petitioners' Appendix E, pp. 34a-35a.

The clubs' contention that there is no ongoing state proceeding is in stark contrast with their vigorous defense within the administrative forum. As recently as October 5, 1999, the clubs filed an objection to the Commission's recent request for statistical information regarding club membership. Appendix D. Nor is there merit to

the clubs' unsupported claim that the initial determination by the Commission precludes subsequent litigation pursuant to the revenue code provisions or the public accommodations laws. The doctrines of *res judicata*,[8] collateral estoppel,[9] and *stare decisis*[10] do not bar reconsideration of these important legal issues. In any event, the legitimacy of these defenses could and should be resolved within the administrative proceeding or by state courts.

The clubs also contend that the ongoing administrative proceeding does not satisfy the first prong of *Middlesex County Ethics Commission* because the Commission's final determination will only be enforceable by the Kentucky Revenue Cabinet. This contention is without

---

[8] *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky. 1998). For claim preclusion to bar further litigation, certain elements must be present. First, there must be identity of the parties. *Newman v. Newman*, 451 S.W.2d 417, 419 (Ky. 1970). The initial administrative proceedings relevant to the clubs were filed by Louis Coleman. AR 121, 257, 406. But the administrative proceedings currently challenged were filed by Mae Cleveland. *Id.*

[9] Where important public interests are involved, collateral estoppel will not bar relitigation of a legal issue. *Western Oil & Gas v. U.S. E.P.A.*, 633 F.2d 803, 809 (9th Cir. 1980); *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 299-300 (7th Cir. 1979); Restatement (Second) of Judgments § 28(2)(b), (3), and (5)(a). *See also, Ward v. Southern Bell Tel. & Tel. Co.*, 436 S.W.2d 794, 796-97 (Ky. 1968) (It would be inequitable to "allow the act of one government attorney, in failing to appeal, to forever bind the state.").

[10] *Revenue Cabinet, Com. of Ky. v. Samani*, 757 S.W.2d 199, 202 (Ky. App. 1988).

basis. A final determination in the ongoing state administrative proceeding will be equivalent to a declaratory judgment adjudicating the legal status of the clubs and the rights of each club's members. Given the fact that the Commission has begun an investigation, held a preliminary hearing, received evidence, and kept an official record, the pending administrative proceeding is clearly a state prosecution sufficient to satisfy the first prong of *Middlesex County Ethics Commission*.

B. The State Proceedings Implicate Important State Interests.

This Court has long recognized the compelling state interest in eliminating discrimination. *Rotary Club v. Duarte*, 481 U.S. 537, 549 (1987); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). Clearly, the state legislature has determined that it is contrary to the public policy of the Commonwealth of Kentucky to extend a tax benefit to individuals who join private clubs which discriminate on the basis of "race, color, religion, national origin, or sex." KRS 141.010(11)(d) and (13)(f).

In the decision denying the clubs' motion to dismiss, the Commission specifically provided that discriminatory membership practices of private clubs "literally relegate women and minorities to side doors and back rooms, perpetuating their treatment as second class citizens that bears no relation to their actual abilities." Petitioners' Appendix E, p. 30a (*citing*, Parker, *Membership Has Its Privileges*, 8 Cal. Law (June 1988)). To the extent that the revenue code provisions intrude upon the associational privacy rights of the clubs, that intrusion is warranted by

a compelling state interest. *Rotary Club v. Duarte*, 481 U.S. 537, 549 (1987). In *Buckley*, this Court stated that where a compelling state interest exists, a "significant interference with protected rights" may be warranted. *Buckley*, 424 U.S. at 25.

In addressing the second prong of *Middlesex County Ethics Commission*, the clubs initially contend that a finding of discrimination under KRS 141.010(11)(d) or (13)(f) will not necessarily bind the Kentucky Revenue Cabinet in its decision whether to bar deductions taken for payments to discriminatory clubs. A simple reading of the revenue code provisions defeats this claim. *See*, Petitioners' Appendix R. Payments to discriminatory clubs are specifically exempted from those items characterized as valid deductions. Under the statutory scheme enacted by the General Assembly, there is no discretion through which the Kentucky Revenue Cabinet could choose to ignore or disregard a Commission finding of discrimination made pursuant to KRS 141.010(11)(d) or (13)(f).

The clubs also suggest that nothing important can come from the agency proceeding because the Commission is barred from prosecuting the clubs. This line of argument defeats the whole purpose of *Younger* analysis because it assumes that this Court is willing to construe the Kentucky statutes in a manner opposite to that of the Commission and Kentucky's Attorney General. As stated previously, the Commission concluded that further investigation is needed in order to determine whether the clubs are exempt from the public accommodation provisions of the Kentucky Civil Rights Act. *See*, Petitioners' Appendix E, pp. 34a-35a. And even if the clubs are eventually found to be exempt from public accommodation

laws, the Commission has found that the clubs are nonetheless subject to Commission prosecution in accordance with the 1990 amendments to the Kentucky Revenue Code. At issue is whether the pending administrative proceeding implicates important state interests. The suggestion that the Commission lacks statutory authority to proceed with the administrative proceeding is simply an end run around the question.

C. There Is An Adequate Opportunity to Raise Constitutional Challenges in the State Proceedings.

A central part of the *Younger* abstention doctrine is a frank recognition that state courts, as judicial institutions of co-extant sovereigns, are equally capable of safeguarding federal constitutional rights. *See, Trainor v. Hernandez,* 431 U.S. 434, 446 (1977). Kentucky courts continue to show no reluctance to remedy constitutional violations where found. *See, e.g., St. Ledger v. Commonwealth,* 912 S.W.2d 34, 38-39 (Ky. 1995) (striking down disparate taxation of in-state and out-of-state bank deposits under intangibles tax scheme as violative of the commerce clause).

The clubs have several avenues for raising and preserving their claims in state court. The foremost of these remedies is a declaratory judgment action in state court. Under Kentucky law, a declaratory judgment action is clearly an appropriate vehicle for challenging the constitutionality of statute or the conduct of State officials. KRS §§ 418.040 et seq. Kentucky's Declaratory Judgment Act

permits statutory construction and constitutional challenges and does not preclude injunctive relief where warranted. *See, Harrodsburg v. Southern Ry.*, 128 S.W.2d 233, 235 (Ky. 1939).

The clubs assert that they must exhaust administrative remedies before seeking relief in state court. But where constitutional or jurisdictional challenges are brought, parties are not required to exhaust administrative remedies. *Rosary Catholic Parish of Paducah v. Whitfield*, 729 S.W.2d 27, 29 (Ky. App. 1987); *International Soc'y for Krishna Consciousness v. Commonwealth*, 610 S.W.2d 910, 912 (Ky. App. 1980); *Dolan v. Land*, 667 S.W.2d 684, 688 (Ky. 1984); *Barrett v. Reynolds*, 817 S.W.2d 439, 441 (Ky. 1991).

The clubs may also raise and preserve their constitutional claims within the administrative forum and on appeal.[11] The clubs may seek interlocutory review of agency actions through a petition for writ of mandamus. *Southeastern United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195, 199-200 (Ky. 1997). The clubs may file a collateral state court constitutional challenge to the agency proceeding. *In re Gillis*, 836 F.2d 1001, 1011-1012 (6th Cir.

---

[11] In 1996, the Kentucky General Assembly enacted KRS Chapter 13B, the Kentucky Administrative Procedures Act. By the express terms of the General Assembly, the underlying administrative proceedings must be conducted in accordance with KRS Chapter 13B. KRS § 13B.020. This Chapter guarantees all aggrieved parties a right to appeal any final agency order. KRS § 13B.140. Courts reviewing agency decisions review *de novo* all legal issues, including allegations regarding the violation of constitutional or statutory provisions. KRS § 13B.150(2)(a).

1988) (Failure to exhaust administrative remedies does not foreclose a state court First Amendment challenge.); *Rosary Catholic Parish of Paducah v. Whitfield*, 729 S.W.2d 27, 29 (Ky. App. 1987) (exhaustion of administrative remedies is not required where the aggrieved party calls into question either constitutionality of statute or ordinance involved or jurisdiction of governmental entity to proceed). Alternatively, the clubs may file a collateral state court challenge regarding the agency's construction of the relevant revenue code provisions. *Franklin v. Natural Resources and Environmental Protection Cabinet, Com. of Ky.*, 799 S.W.2d 1, 2 (Ky. 1990) (Direct judicial relief is available, without exhaustion of administrative remedies, where there are no disputed factual questions to be resolved and the issue is confined to the validity or application of a statute or ordinance.); *Harrison's Sanitarium, Inc. v. Com., Dept. of Health*, 417 S.W. 137, 138 (Ky. 1967).

It is widely recognized that the availability of declaratory relief under state law constitutes a "plain, speedy and efficient" remedy. *See, e.g., Folio v. City of Clarksburg*, 134 F.3d. 1211, 1215 (4th Cir. 1998); *Burris v. City of Little Rock*, 941 F.2d 717, 720-21 (8th Cir. 1991); and, *Long Island Lighting Co. v. Town of Brookhaven*, 889 F.2d 428, 431-32 (2nd Cir. 1989). This Court should likewise recognize the adequacy of the clubs' remedies under the Kentucky Declaratory Judgment Act.

In *Moore v. Sims*, 442 U.S. 415, 429-430 (1979), this Court held:

> Here it is abundantly clear that appellees had an opportunity to present their federal claims in the state proceedings. No more is required to

> invoke *Younger* abstention. . . . Appellees need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings . . . and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate.

Id. (internal citations and quotations omitted). In *Moore*, the appellees argued that there was no adequate remedy at state law because their "every effort, to obtain judicial relief in State court was either frustrated or denied." *Id.* Clearly, this allegation does not satisfy the third prong of *Middlesex County Ethics Commission*. The clubs should fare no better. They have a variety of remedies available in state court, and pursuant to the *Younger* abstention doctrine, they should be required to pursue those remedies.

CONCLUSION

Based upon the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

MORGAN G. RANSDELL
Kentucky Commission on Human Rights
332 West Broadway, 7th Floor
Louisville, KY 40202
(502) 595-4024

Counsel of Record for Respondents

Of Counsel:
D. BRENT IRVIN
Office of Attorney General
Albert B. Chandler, III
700 Capitol Avenue,
Room 118
Frankfort, KY 40601-3449
(502) 696-5300

LESLIE A. JONES
Kentucky Commission
on Human Rights
332 W. Broadway,
7th Floor
Louisville, KY 40202
(502) 595-4024

APPENDIX A

[SEAL]

COMMONWEALTH OF KENTUCKY

OPINION OF THE ATTORNEY GENERAL

FREDERIC J. COWAN
ATTORNEY GENERAL

STATE CAPITOL
FRANKFORT 40601

OAG 91-197
November 14, 1991

Anne Meagher Northup,
State Representative
Kentucky House of Representatives
3340 Lexington Road
Louisville, Kentucky 40206

RE: KRS 141.010(11)(d) and (13)(8)

Dear Representative Northup:

You recently wrote a letter to this office in which you asked for an opinion regarding KRS 141.010 as it pertains to deductions for amounts paid by taxpayers to any club, organization or establishment determined not to afford full and equal membership to persons because of race, color, religion, national origin or sex. KRS 141.010(11)(d) and (13)(f). You asked who has authority to make the determination that a particular club, organization or establishment is engaged in discriminatory membership practices.

KRS 141.010 specifies that this determination is to be made by the courts or by "an agency established by the Generai Assembly and charged with enforcing the civil rights laws of the Commonwealth." KRS 141.010(11)(d) and (13)(f). The agency so established and charged is the Kentucky Commission on Human Rights. KRS 344.020;

KRS 344.150. You have indicated, however, that the Commission has declined to assume responsibility on the grounds that private clubs are not places of "public accommodation, resort or amusement" as defined by KRS 344.130.

We are of the opinion that KRS 344.130 does not prevent the Commission on Human Rights from making the determination called for under KRS 141.010. Furthermore, it is our opinion that the authority granted to the Commission under Chapter 344 is broad enough to encompass the responsibility assigned to it by the General Assembly in 1990 when KRS 141.010 was amended to include sections (11)(d) and (13)(f).

KRS 344.130 exempts private clubs from compliance with KRS 344.120 which makes it an unlawful practice "to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation, resort or amusement" on the basis of race, color, religion or national origin. KRS 344.120. By enacting KRS 141.010)(11)(d) and (13)(f) the General Assembly did not alter this exemption for private clubs under KRS 344.130. Rather, it expressed the separate and independent intention that no income tax deduction would be allowed for amounts paid by taxpayers to private clubs which engage in discriminatory membership practices.

It is presumed that legislatures have knowledge of existing laws and the construction placed on them by the courts. *Baker v. White*, Ky., 65 S.W.2d 1022, 1024 (1933). The narrow income tax focus of KRS 141.010 supports the

presumption that the General Assembly in amending sections (11) and (13) to include subsections (d) and (f), respectively, was well aware that private clubs are exempt from discrimination complaints under KRS 344.120. Additionally, it has long been recognized that where two statutes are not repugnant to each other, although they may deal to some extent with matters pertaining to the same subject, and each can be enforced consistently with the provisions of the other, courts will enforce the provisions of each. *Newport Benev. Burial Ass'n. v. Clay*, Ky., 186 S.W. 658, 662 (1916). Both KRS 344.130 and KRS 141.010(11)(d) and (13)(f) deal with private clubs, and both statutes involve the Commission on Human Rights. But in our view, neither statute is "repugnant to" the other, and it is our opinion that each can and should be given its independent effect.

Moreover, there is ample authority under the purposes, functions, powers and duties outlined in Chapter 344 to encompass the Commission's assigned participation in determining the allowability of deductions under KRS 141.010(11)(d) and (13)(f). The purpose of Chapter 344 is to "safeguard all individuals within the state from discrimination because of race, color, religion, national origin, sex, and age." KRS 344.020(1)(b). The Commission on Human Rights was established "to discourage discrimination against any racial or ethnic group or its members." KRS 344.150; KRS 344.170. Among its powers and duties the Commission is charged with conducting research projects or making studies into and publishing reports on discrimination, with encouraging fair treatment for all persons regardless of race or national ancestry, and with cooperating with other public and private

organizations to discourage discrimination. KRS 344.180. In enforcing the provisions of Chapter 344, the Commission is also granted the authority to "make studies appropriate to effectuate the purposes and policies of this chapter and to make the results thereof available to the public." KRS 344.190.

KRS 446.080(1) provides that "[a]ll statutes of the state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature." We believe that with regard to the deductions disallowed under KRS 141.010(11)(d) and (13)(f), the legislature intended that it should be the Kentucky Commission on Human Rights which determines whether a club, organization or establishment does not afford full and equal membership based on race, color, religion, national origin or sex. It is the opinion of this office that KRS 344.130 does not prohibit the Commission from making such determinations for this limited purpose.

/s/ Frederic J. Cowan
FREDERIC J. COWAN
ATTORNEY GENERAL

/s/ Samuel J. Floyd, Jr.
SAMUEL J. FLOYD, JR
ASSISTANT ATTORNEY GENERAL

SJF:11h

EXHIBIT A

Commonwealth of Kentucky

ANNE MEAGHER NORTHUP
HOUSE OF REPRESENTATIVES

[SEAL]

[Address Omitted In Printing]

October 9, 1991

Attorney General Fred Cowan
State Capitol
Frankfort, KY 40601

Dear General Cowan:

This is to request an Opinion of the Attorney General with regard to the discriminatory practices of private clubs and organizations. While the general case law is fairly clear that these organizations have been allowed to continue restrictive admissions practices due to the fact that their services and benefits are not available to the public, and based on the competing rights of non-association and association, the state should do nothing that contributes to the existence, stability or financial well-being of these clubs. A 1990 amendment to Kentucky's Revenue Code as it relates to deductions for amounts paid to certain organizations raises several questions.

In 1990, the General Assembly amended KRS 141.010 to alter the definition of "net income", both in the case of individuals and corporations, to disallow:

> Any deduction for amounts paid to any club, organization, or establishment which has been determined by the courts or an agency established by the General Assembly and charged

> with enforcing the civil rights laws of the Commonwealth, not to afford full and equal membership and full and equal enjoyment of its goods, services, facilities, privileges, advantages or accommodations to any person because of race, color, religion, national origin, or sex, except nothing shall be construed to deny a deduction for amounts paid to any religious or denominational club, group, or establishment or any organization operated solely for charitanble [sic] or educational puposes [sic] which restirct [sic] membershp [sic] to persons of the same religion or denomination in order to promote the religious principles for which it is established and maintained.

(KRS 141.010 (11)(d) and KRS 141.010 (13)(f)).

While the language of these provisions seem to indicate that the Human Rights Commission would be the agency which would make the determination as to whether a private club has discriminatory practices which would disallow a contributor from claiming a deduction for amounts paid thereto, the Commission has declined to assume that responsibility on the grounds that private clubs are exempt from the definition of "place of public accommodation, resort, or amusement" in KRS 344.130

Does not the bill passed in 1990 implicitly grant the Human Rights Commission the authority to make a determination of discrimination with regard to clubs? Since the 1990 statute is more recent than the statute that limits the power of the Human Rights Commission, would it not take precedence?

If the Commission on Human Rights has no jurisdiction to determine whether an organization's practices are discriminatory, what entity has that authority? Secondly, if no one currently has that authority, and therefore, amounts paid to such groups continue to be deducted, does this not amount to a state sanction of such discrimination practices in that the tax burden of individuals and corporations can be reduced by the deduction?

The facilities of private clubs are sustained, at least partially, by initiation fees, dues and expenses paid by companies and individuals that are then deducted from their income for income tax purposes. These entities are thus reducing their tax liability while they support clubs that discriminate. Surely the state has a right to ensure that it does not continue to be an "enabler" to discrimination.

I am enclosing a copy of a letter from Mr. Thomas Ebendorf, former Compliance Director and Staff Counsel of the Human Rights Commission, in which he discusses the Commission's right to make this determination. I would greatly appreciate a response as soon as possible as to the right of the Human Rights Commission to make such a determination.

Sincerely,

/s/ Anne M. Northup
Anne Meagher Northup
State Representative

AMN:kd
Enclosure

LAW OFFICES
FROCKT & KLINGMAN
[Names And Addresses Omitted In Printing]

October 9, 1991

Anne Meagher Northup, Member
Kentucky House of Representatives
3340 Lexington Road
Louisville, Kentucky 40206

Dear Rep. Northup:

I enjoyed your remarks on the issue of disallowing tax deductions for discriminatory private clubs at this morning's meeting of the Louisville Forum. I believe the bill which you introduced and passed in the last session of the General Assembly, promises to be an effective weapon against discrimination in private clubs. I share your disappointment with the announced decision of the Kentucky Commission on Human Rights not to accept and investigate complaints of discrimination against private clubs, and I believe their decision was an error. As the former Compliance Director and staff counsel of the Commission, I have spent over 20 years interpreting and enforcing discrimination laws.

My initial review of the relevant statutes does not lead me to the conclusion that the Kentucky Commission is without authority to investigate private club discrimination complaints. The Kentucky Civil Rights Act excludes a bonafide private club from its definition of a place of public accommodations (KRS 344.130). This exclusion from the definition would therefore exempt a bonafide private club from the prohibitions against discrimination set forth in KRS 344.120.

However, the Commission's power to investigate and make determinations is not derived from either of those coverage sections (KRS 344.130 or 120). The Commission's powers and duties are set forth in KRS 344.180 and 190. The pertinent provisions empowering the Commission to investigate, are located at Section 180(3), Section 190(8), and Section 190(10). The question as I would pose it to the Attorney General would be: "Are the provisions of KRS 344.180 and 190 sufficient to empower the Commission to conduct investigations, make determinations whether a club, organization or establishment, discriminates in its membership policies or practices and report its findings to the Kentucky Revenue Cabinet for appropriate action?" It is the Kentucky Revenue Cabinet's duty to apply the limitations on income tax deduction set forth in KRS 141.010. The Kentucky Commission on Human Rights' role is limited to supplying its determination after an investigation performed under the authority of KRS 344.180 and 190. The question of the Commission's authority to investigate and make determinations is the issue, not the [sic] whether a private club is prohibited from discriminating under the provisions of the Kentucky Civil Rights Act.

I understand that you have initiated a request for an opinion from the Attorney General's office on this issue. I would appreciate receiving a copy of your letter

requesting an opinion and would be happy to consult with you concerning any future efforts to deal with this issue.

Very truly yours,

FROCKT & KLINGMAN

/s/ Thomas A. Ebendorf
Thomas A. Ebendorf
Attorney at Law

TAE/clj

APPENDIX B

COMMONWEALTH OF KENTUCKY
KENTUCKY COMMISSION ON HUMAN RIGHTS
KCHR COMPLAINT NOS. 256-PA, 257-PA, 258-PA

KENTUCKY COMMISSION ON HUMAN RIGHTS

COMPLAINANT

v. **NOTICE OF WITHDRAWAL OF PENDING DISCOVERY DEMANDS AND COMPLAINANT'S INTERROGATORIES SEEKING STATISTICAL INFORMATION REGARDING CLUB MEMBERSHIP**

LOUISVILLE COUNTRY CLUB,
IDLE HOUR COUNTRY CLUB, and
PENDENNIS CLUB INCORPORATED

RESPONDENTS

* * * * * * * * * * *

The Respondents shall take notice that the Kentucky Commission on Human Rights hereby withdraws its pending discovery requests which seek: (1) the production of documents containing "Any and all MEMBERSHIP LISTS WITH NAME AND DATES DESIGNATED THEREON;" and (2) the names of club members, membership applicants, employees, officers, or individuals denied membership. The Kentucky Commission on Human Rights expressly reserves the right to seek such lists or information in the future, should such discovery be determined necessary to an adjudication of the present action.

In lieu of the withdrawn discovery demands, the Commission submits the following interrogatories to each of the Respondents.

INTERROGATORIES

1. Identify the total number of current members of your club?

   RESPONSE:

2. Identify the total number of current members of your club who are black.

   RESPONSE:

3. Identify the total number of current members of your club who are american indian, eskimo, or aleut.

   RESPONSE:

4. Identify the total number of current members of your club who are hispanic.

   RESPONSE:

5. Identify the total number of current members of your club who are asian.

   RESPONSE:

6. Identify the total number of current members of your club who are white.

   RESPONSE:

7. Identify the total number of current members of your club who are of a race other than those listed above in interrogatories two through six.

   RESPONSE:

8. Identify the total number of current members of your club who are female?

RESPONSE:

Respectfully submitted,

KENTUCKY COMMISSION ON HUMAN RIGHTS

/s/ Morgan Ransdell
Morgan G. Ransdell, Esq.
Leslie A. Jones, Esq.
The Heyburn Bldg., Seventh Floor
332 West Broadway
Louisville, KY 40202
(502) 595-4024

CERTIFICATE OF SERVICE

I certify that the original copy of the foregoing has been served for filing, by hand-delivery, this 30th day of August, 1999, upon: Kentucky Commission on Human Rights, The Heyburn Building, 7th Floor, 332 West Broadway, Louisville, Kentucky 40202. I further certify that, on the same date, a true copy of the foregoing was mailed to: Mr. John O. Sheller, SMITH & SMITH ATTORNEYS, 400 North First Trust Centre, 200 South Fifth Street, Louisville, KY 40202, Counsel for Louisville Country Club; Mr. Richard G. Griffith, STITES & HARBISON, 2300 Lexington Financial Center, 250 West Main Street, Lexington, KY 40507-1758, Counsel for Idle Hour Country Club; Mr. D. Patton Pelfrey, BROWN, TODD & HEYBURN, 3200 Providian Center, Louisville, KY 40202-3363, Counsel for Pendennis Club Incorporated.

/s/ Morgan Ransdell
Morgan G. Ransdell,
Staff Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT
CIVIL ACTION NO. 95-48

LOUISVILLE COUNTRY CLUB, ET AL.

PLAINTIFFS

v. REPORT OF PARTIES' PLANNING MEETING

(Filed May 31, 1996)

KENTUCKY COMMISSION ON HUMAN RIGHTS, ET AL.

DEFENDANTS

* * * * * * * * *

Pursuant to the Court's Order of April 29, 1996, the parties hereby submit their joint report under Rule 26(f) as follows:

1. Pursuant to Fed. R. Civ. P. 26(f), the following counsel for the parties conferred on or before May 21, 1996, to develop this joint report:

a. For the plaintiffs:

Richard G. Griffith, Esq. – Idle Hour Country club

John O. Sheller, Esq. – Louisville Country Club

D. Patton Pelfrey, Esq.[1] Pendennis Club

---

[1] Mr. Pelfrey was not available to participate, but was represented by John O. Sheller, Esq.

b. For the defendants:

D. Brent Irvin, Esq.

Morgan G. Ransdell, Esq.

2. Initial Disclosures under Rule 26(a)(1)

a. Plaintiffs: Plaintiffs have disclosed to defendants in administrative proceedings which preceded this lawsuit (and in attachments to their verified Complaints) all documents which they contend fall within the scope of initial disclosures under Fed. R. Civ. P. 26(a)(1)(B). Fed. R. Civ. P. 26(a)(1)(C), (D) are inapplicable to plaintiffs. Plaintiffs contend that they cannot make additional disclosures which may be required by Fed. R. Civ. P. 26(a)(1)(A) and (B) without defeating the very purpose of this action – to preserve the constitutional privacy and associational rights of their members. Defendants disagree and anticipate a dispute regarding the privilege which plaintiffs claim, and the scope of relevant discovery.

b. Defendants: To date, Plaintiffs have received, in administrative proceedings which preceded this lawsuit, certain documents within the scope of initial disclosures under Fed. R. Civ. P. 26(a)(1)(B). Defendants have made no disclosures pursuant to Fed. R. Civ. P. 26(a)(1)(A) and (B). Fed. R. Civ. P. 26(a)(1)(C), (D) are inapplicable to defendants. Defendants contend that certain documents in their custody are protected from discovery by attorney/client and/or work product privilege. Plaintiffs disagree. In light of the joint motion to stay discovery, Defendants contend that they should be exempt from making additional disclosures during the requested stay of discovery. Plaintiffs disagree; nevertheless, Plaintiffs agree not to take any action regarding Fed. R. Civ. P.

26(a)(1) disclosures if and while the requested stay is in place.

3. Discovery Plan

The parties request all discovery be stayed pending resolution of initial dispositive motions. The parties state that the initial dispositive motions in this action will not necessitate discovery. Because it is anticipated that discovery will result in collateral litigation, the parties request that the Court stay all discovery until resolution of initial dispositive motions. The parties agree to file initial dispositive motions on or before August 15, 1996. After such motions are disposed of by the Court, the parties request that discovery be resumed.

If and when it becomes necessary to conduct discovery, the parties agree that they will confer (in person or by teleconference) in advance of the service of any written discovery requests, deposition notices and subpoenas to explore appropriate limitations on the methods, nature, scope and timing of discovery. The parties agree that, among other possible limitations, they will consider the limitations described in Fed. R. Civ. P. 26(c).

4. Other Items

a. The parties do not request a conference with the Court and do not believe that the entry of a scheduling order is necessary in this action at this time.

b. The parties do not request a pretrial conference and do not believe that one should be set at this time.

c. The parties agree that, other than as prescribed by Fed. R. Civ. P. 25(d)(1), no additional parties should be joined in this action.

d. The parties agree to file the above mentioned initial dispositive motions on or before August 15, 1996. After such motions are disposed of by the Court, the parties request that discovery be resumed and a status conference be convened to determine any future scheduling.

e. Settlement is highly unlikely. The parties have discussed settlement on numerous occasions in a rational, cooperative and cordial manner. They do not believe that any form of alternative dispute resolution procedure would facilitate settlement.

f. The exchange of final lists of witness and exhibits should be deferred pending the entry of a scheduling order at a later date.

g. The parties cannot now anticipate when this case would be ready for trial. Once ready, the parties believe the trial would take about five days. Because no party has demanded trial by jury, the trial would be a bench trial.

h. There is no mutual consent to refer this case to a United States Magistrate Judge.

Respectfully submitted,

A.B. CHANDLER III
ATTORNEY GENERAL
/s/ D. Brent Irvin
D. Brent Irvin
Morgan G. Ransdell
Assistant Attorneys General
P. O. Box 2000
Frankfort, KY 40602-2000
Counsel for Defendants

KENTUCKY COMMISSION ON HUMAN RIGHTS
/s/ Leslie A. Jones
Leslie A. Jones by DBI
Laura H. Early
The Heyburn Bldg., Seventh Floor
332 West Broadway
Louisville, KY 40202
Counsel for Defendants

STITES & HARBISON
/s/ Richard G. Griffith

Richard G. Griffith
2300 Lexington
Financial Center
Lexington, KY 40507-1758
Counsel for Idle Hour
Country Club

SMITH & SMITH
ATTORNEYS
/s/ John O. Sheller
James U. Smith III
John O. Sheller by DBI
400 North First
Trust Centre
200 South Fifth Street
Louisville, KY 40202
Counsel for Louisville
Country Club

BROWN, TODD
& HEYBURN
/s/ D. Patton Pelfrey
D. Patton Pelfrey by DBI
James D. Cockrum
3200 Providian Center
Louisville, KY 40202-3363
Counsel for Pendennis
Club

APPENDIX D

COMMONWEALTH OF KENTUCKY
KENTUCKY COMMISSION ON HUMAN RIGHTS
KCHR COMPLAINT NOS. 256-PA, 257-PA, 258-PA

KENTUCKY COMMISSION ON HUMAN RIGHTS [SIC]

COMPLAINANT

v.

RESPONDENTS' OBJECTION TO AND MOTION FOR ENLARGEMENT OF TIME TO RESPOND FURTHER TO "NOTICE OF WITHDRAWAL OF PENDING DISCOVERY DEMANDS AND COMPLAINANT'S INTERROGATORIES SEEKING STATISTICAL INFORMATION REGARDING CLUB MEMBERSHIP"

LOUISVILLE COUNTRY CLUB,
IDLE HOUR COUNTRY CLUB, and
PENDENNIS CLUB INCORPORATED

RESPONDENTS

(Filed Oct. 5, 1999)

* * * * * * *

Respondents object to the "Notice of Withdrawal of Pending Discovery Demands and Complainant's Interrogatories Seeking Statistical Information Regarding Club Membership" on the following grounds:

1. The Complainant in the referenced cases is Mae Cleveland, not the KCHR.

2. The KCHR has no personal or subject matter jurisdiction in this case.

3. The Respondents object on all grounds set forth in the pleadings, motions, briefs, and other papers previously filed in this proceeding, in the Coleman proceeding, in the federal district court proceeding, and in all related appellate proceedings.

4. The Respondents object because neither the KCHR's enabling statute or regulations nor the Kentucky Rules of Civil Procedure permit unilateral withdrawal of previous discovery requests, particularly where such requests are not withdrawn with prejudice to their resubmission.

5. The discovery requests violate the Respondents' rights under the First and Fourteenth Amendments to the United States Constitution, including but not limited to, their rights of free association, privacy, equal protection, substantive due process, and procedural due process.

6. The discovery requests violate the KCHR's own prior orders in this case or the Coleman case holding that (a) the KCHR does not have jurisdiction and (b) the KCHR should first conduct an investigation of its own jurisdiction, rather than on the issue of discrimination.

7. The discovery requests violate the KCHR's agreement to refrain from proceeding with administrative activities in this case pending the federal litigation.

8. The discovery requests are barred by laches.

9. The discovery requests are barred by the doctrines of waiver, estoppel, and unclean hands.

10. The discovery requests are barred by the law of the case doctrine.

11. The discovery requests are invalid and ineffectual under the provisions of KRS 344.200(2), KRS 344.200(6), and KRS 344.210(1).

12. Respondents expressly reserve any and all other objections they may have to the discovery requests and, without in any way waiving their position that the KCHR has no jurisdiction in this matter, Respondents move for an enlargement of the response time to and including December 31, 1999, in order to submit further objections, responses, or motions in connection with the discovery requests.

13. In support of their motion for enlargement, Respondents submit that it is their understanding, based upon communications with counsel for the parties, that no enforcement is contemplated regarding the discovery requests during calendar year 1999. An extension for Respondents to respond further on or before December 31, 1999, is consistent with this understanding.

WHEREFORE, Respondents pray that their objections be entered in the record and that their motion be granted.

Respectfully submitted,

SMITH and SMITH, ATTORNEYS
/s/ John O. Sheller
John O. Sheller
400 North, First Trust Centre
200 South Fifth Street
Louisville, Kentucky 40202
(502) 587-0761
Counsel for Respondent
Louisville County Club

STITES & HARBISON

/s/ Richard G. Griffith
Richard G. Griffith
2300 Lexington Financial Center
250 West Main Street
Lexington, Kentucky 40507
(606) 226-2300
Counsel for Respondent
Idle Hour Country Club

BROWN, TODD
& HEYBURN, PLLC

/s/ D. Patton Pelfrey
D. Patton Pelfrey
Robert W. Dibert
3200 Aegon Center
400 West Market Street
Louisville, Kentucky 40202
(502) 589-5400
Counsel for Respondent
The Pendennis Club, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing RESPONDENTS' OBJECTION TO AND MOTION FOR ENLARGEMENT OF TIME TO RESPOND FURTHER TO "NOTICE OF WITHDRAWAL OF PENDING DISCOVERY DEMANDS AND COMPLAINANT'S INTERROGATORIES SEEKING STATISTICAL INFORMATION REGARDING CLUB MEMBERSHIP" was

served this 4th day of October, 1999, by United States mail, postage prepaid, upon:

KENTUCKY COMMISSION ON HUMAN RIGHTS
Leslie A. Jones, Esq.
Morgan G. Ransdell, Esq.
The Heyburn Building - 7th Floor
332 West Broadway
Louisville, Kentucky 40202

/s/ Illegible
Counsel for Respondents